United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA

MILTON M. LEVIN, Appellant, v. NICHOLAS DE B. KATZENBACH, Appellee.	:	No. 19,590

F534

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THURMAN ARNOLD

1229 - 19th Street, N.W.
Washington, D.C. 20036

Attorney for Appellant

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 - 19th Street, N.W.
Washington, D.C. 20036

August 30, 1965

QUESTION PRESENTED

The question presented is whether Appellant is entitled to a writ of habeas corpus or, in the alternative, a new trial on the basis of newly discovered evidence consisting of: (A) an admission by the Solicitor General, in his Opposition to Certiorari, of the falsity of part of key testimony of the principal Government witness against Appellant and (B) facts known to but not disclosed by the Government at the criminal trial which demonstrate the falsity of the remaining key testimony of the principal Government witness against Appellant.

MILTON M. LEVIN,	
Appellant	
v.	
NICHOLAS DE B. KATZENBACH,	
Appellee	

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JURISDICTIONAL STATEMENT

Appellant was convicted on May 10, 1963, in the United States District Court for the District of Columbia of grand larceny by trick in violation of 22 D.C. Code § 2201. The Court of Appeals affirmed that conviction on June 21, 1964, in a two to one decision, Judge Bazelon dissenting. On February 1, 1965, the Supreme Court denied Certiorari. On February 25, 1965, and March 8, 1965, Appellant filed a Petition and an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §§ 1651(a), 2241 or, in the alternative, for an order vacating judgment and granting a new trial pursuant to 18 U.S.C. Rule 33 or 28 U.S.C. § 2255. The United States District Court for the District of Columbia dismissed that Petition on June 15, 1965. A Notice of Appeal was filed on June 29, 1965, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant, Milton M. Levin (hereinafter referred to as Levin), an attorney of excellent reputation, was convicted

of larceny by trick in that he took from officers of the Bakery and Confectionery Worker's International Union $35,000.00 for the purpose of bribing a judge and jury and thereafter failed to carry out his agreement to bribe and kept the money. The record on habeas corpus taken in connection with the record at the trial discloses the following extraordinary story.

Thirty-five thousand dollars ($35,000.00) was embezzled from the Union by its officers, Peter H. Olsen, Richard E. Ashby and James Landriscina, all of whom appeared as witnesses for the prosecution and admitted the embezzlement. Landriscina, the principal witness against Appellant, testified at great length and in detail about a series of meetings as a result of which he stated that the conspiracy to bribe the judge and jury was initiated and finally put into effect (Tr. 6, 8, 12-26, 308). His testimony about the initial meetings is not only uncorroborated but denied by Vincent Belloni, an officer of a local of the Union and witness for the prosecution who was present (Tr. 309, 339-40, 343). Landriscina was the sole witness as to the actual delivery of the money to Appellant. His

testimony concerning the payments covers four days, from February 10 to February 13, 1959, inclusive. Landriscina said that he met Levin in the Congressional Hotel in Washington on February 10, 1959, at which time Levin said he had to have $10,000.00 at once for the purpose of carrying out the conspiracy to bribe (Tr. 15-16). The next day, on February 11, Landriscina said he arranged by telephone a meeting with Levin at the Statler Hotel on February 12, at which time the initial $10,000.00 demanded by Levin was to be delivered in cash (Tr. 17-19). The next day, February 12, Landriscina and Levin met at the Statler. They walked to a park and sat on a bench, at which time Landriscina gave Levin ten $1,000.00 bills (Tr. 17, 19-20, 22).

The record shows that the meeting which Landriscina testified to in great detail never took place. The reason why the meeting could not have taken place is that the record conclusively establishes that the $1,000.00 bills alleged by Landriscina to have been paid to Levin were not received by the Union until the next day when Olsen, Secretary-Treasurer of the Union, cashed a check for $35,000.00 (attached as Exhibit C) and received thirty-five $1,000.00 bills. Both the

cancelled check and Olsen's testimony established this fact (Tr. 197, 224).

It has been suggested by the Government that Landriscina might have been confused as to the dates and that the payment he testified to on February 12 might have been a lapse of memory. This explanation is incredible because of the elaborate and precise detail in which Landriscina described the meeting. The inference is strong that in preparing his perjured testimony Landriscina noted that the check was dated February 12, 1959. He felt he had to cover that date with some kind of a payment. He failed to notice that the actual cashing of the check was the next day.

It was so clear from the record that a meeting at which Landriscina gave Levin the ten $1,000.00 bills could not have taken place on February 12 that the Solicitor General was compelled to admit in his Opposition to Certiorari (relevant page attached as Exhibit D) that no such payment was made on that date. He said in a footnote:

> "Landriscina testified, apparently incorrectly, that he made the first payment of $10,000 on February 12 (R. 19-25)."

Had this admission, which must be treated as newly discovered evidence, been before the jury at the trial, it would have completely discredited Landriscina's story not only about a meeting and payment on February 12 but also completely discredited his story about an alleged meeting on February 13 at which Landriscina said that he had delivered to Levin an additional $25 thousand in twenty dollar bills. This is because Landriscina testified positively and in detail that it was on February 12 when he gave Levin ten $1,000.00 bills that he arranged to meet Levin the next day at 5 o'clock to deliver the additional $25,000.00. He further testified that he had no contact with Levin between the alleged meeting on February 12 and the meeting the next day (Tr. 18, 19, 24, 25). If, therefore, the payment did not take place at a meeting on February 12, as the Solicitor General admits, there would have been no possible way for Levin to know where and when he was to meet Landriscina on February 13. This was not pointed out to the Court by Levin's counsel in his reply to the Solicitor General's Opposition to Certiorari.

The Court suggests in its findings, in the face of this record, that some other kind of a meeting in which payment was

not involved might have taken place and at that speculative meeting arrangements to meet the next day could have been made. This is incredible. It does not fit in with Landriscina's testimony that Levin demanded on the evening of February 11 that he be given $10,000.00 on February 12 and that the sole purpose of the February 12 meeting was to deliver the $10,000.00. Had the admission of the Solicitor General been before it, the Court would have been compelled to find that there was no payment on February 12 and that Landriscina's elaborate detail about that meeting was perjured. Having determined that fact, the Court would have been compelled to find that no payment could have taken place on February 13 according to Landriscina's story. No court familiar with the doctrine of reasonable doubt would have let the case go to the jury on what meetings might have taken place concerning which there was no testimony. Yet this is precisely the position which the court below took.

Other newly discovered evidence, which was in the files of the prosecution at the time of the criminal trial but not disclosed until the habeas corpus proceeding, completely discredits Landriscina's story.

Landriscina testified that between 11 and 11:30 he gave Levin ten $1,000.00 bills; that at 12 o'clock at the request of

Levin over the telephone he met him again at the Statler; that Levin returned the money and asked for smaller bills; that by around 1 o'clock Landriscina had succeeded in getting the ten $1,000.00 bills exchanged into $20.00 bills which he delivered to Levin. At the same time they arranged to meet the next day at 5 o'clock. It was at 5 o'clock the next day according to Landriscina that he met Levin at the Statler, walked to the park, and gave Levin $25,000.00 in $20.00 bills (Tr. 25-26).

With respect to this testimony the Government had in its possession two documents taken from the files of the National Savings and Trust Company. The first was a check for $35,000.00 (attached as Exhibit E) drawn on the Riggs National Bank by the National Savings and Trust Company (H.C. Tr. 212-13). This check was delivered to Levin's present counsel prior to the trial on habeas corpus. It led to an immediate interview with the officials of National Savings and Trust. At that interview counsel was informed that Olsen had cashed a Union check and received thirty-five $1,000.00 bills on February 13. When counsel questioned the bank officials about whether the thirty-five $1,000.00 bills had been changed into 1,750 $20.00 bills, he was told that they

had no recollection of any such unusual transaction, and it would have been impossible to have made that exchange without their knowledge unless the procedures of the bank were violated (H.C. Tr. 64, 70-71, 129).

Had this evidence been before the jury, it would have been impossible for them to convict and a conviction, if found, could not have been sustained. On the basis of this newly discovered document an amended petition for habeas corpus was filed.

At the habeas corpus trial, a Subpoena Duces Tecum served on Harry T. Alexander, Assistant United States Attorney, led to the disclosure of a second document (attached as Exhibit F). It was a statement by Benjamin McCeney that neither he nor Mr. Hunter Hooper recalled the unusual transaction of changing thirty-five $1,000.00 bills into 1,750 $20.00 bills. Had this document been available to counsel for Levin, it would have led to the discovery of the evidence which shows that the exchange was never made and that the entire testimony with respect to the payment of 1,750 $20.00 bills was perjured.

Yet the trial court found that the bank officials' recollection was vague and completely ignored their positive

and uncontradicted testimony that the transactions could not have taken place unless the bank rules had been violated.

Furthermore, with respect to the issue of concealment of evidence by the prosecution the trial court ignored the fact that the prosecution had blocked the previous attempts of Levin's counsel to see this evidence. Mr. Jacob Stein, then counsel for Levin, filed two pre-trial motions for discovery which were opposed by the Government as being a "fishing expedition" and denied by the criminal trial court. (Attached as Exhibit G are Appellant's motions and the Government's answers. Judge Sirica's order denying the motions was entered on January 28, 1963.) As a result, Mr. Stein never saw the Riggs check or the McCeney statement (H.C. Tr. 172-73, 182-84) and was misled into making a few unfruitful inquiries at the bank instead of pursuing what would have been the obvious line of questioning had he seen the documents. The prosecution could not help but be aware of the compelling nature of this evidence. The inference is strongly supported, in the light of their possession of the evidence, that the prosecution wilfully suppressed this evidence and knowingly obtained a conviction on the basis of perjured testimony.

The following table sets forth the various versions of the events leading up to and comprising the alleged act of larceny by trick. The table contains (1) the version given before the trial court by James Landriscina, an officer of the International Union and the key witness against Appellant; (2) the versions of Vincent Belloni, an officer of a local of the Union, Peter H. Olsen, Secretary-Treasurer of the Union, and Richard E. Ashby, Comptroller of the Union, Government witnesses whose testimony in part contradicts and in part supports that of Landriscina; and (3) the newly discovered evidence.

Landriscina	Belloni, Olsen and Ashby	Newly Discovered Evidence
January, 1959 - New York		
Levin told Landriscina in the presence of Belloni that he could bribe the judge and jury in the perjury prosecution of Cross for the sum of $35,000 (Tr. 6, 308). Arrangements were made to meet Cross in Washington in pursuance of the conspiracy to bribe (Tr. 8).	Belloni, who was never indicted by the Government for any crime, repudiated Landriscina's version of the conversation (Tr. 309) testifying that Levin had never suggested that anything illegal be done (Tr. 339), that Levin never used the word "fix" or said that he could influence anyone in Washington (Tr. 340), and that nothing unusual or irregular happened (Tr. 343).	
February 4-5, 1959 - Washington		
On February 4 Levin again offered to "fix the judge and jury." On February 5, Cross agreed to pay the $35,000 (Tr. 12, 14).		

February 10, 1959 - Washington

Levin telephoned Landriscina from the Congressional Hotel. They met in Levin's room and Levin said he must have $10,000 at once (Tr. 15-16)1/

February 11, 1959 - Washington

Landriscina telephoned Levin at the Congressional Hotel and arranged February 12th meeting at Statler for payment of $10,000 to Levin (Tr. 17-19).

February 12, 1959 - Washington

11-11:30 a.m. - Landriscina and Levin met at the Statler and walked to a park where Landriscina gave Levin $10,000 (Tr. 17, 19-20, 22).

Olsen and Ashby contradicted Landriscina testifying that the Union check was cashed on Feb. 13 and that Landriscina did not receive the $35,000 until Feb. 13 (Tr. 197, 224).2/

The Government in its brief opposing Appellant's Petition for Certiorari admitted that Landriscina testified incorrectly that he gave Levin $10,000 on Feb. 12.

1/ The Government could find no records showing that Levin stayed at the Congressional Hotel on February 10, though they did find records of his stay there on Feb. 15-17.

2/ The Union check (Petitioner's Exhibit 1) shows that the check was cashed on February 13.

12:00 p.m. - Levin telephoned Landriscina and asked to meet again at the Statler. They met and Levin returned the money and asked for smaller denominations (Tr. 22).
12:45-1:00 p.m. - They met and Landriscina gave Levin $10,000 in $20 bills (Tr. 23-25). They arranged to meet at the Statler at 5:00 p.m. on February 13 (Tr. 25). They had no contact or communication from this time until their meeting on Feb. 13 (Tr. 25).

February 13, 1959 - Washington

At 5:00 p.m. Landriscina met Levin at the Statler as arranged the day before. They walked to the same park and Landriscina gave Levin $25,000 in $20 bills (Tr. 25-26).

Both Olsen and Ashby testified that the check for $35,000 was cashed by Olsen on Feb. 13. Ashby testified that he gave part of the money to Landriscina, who later returned it. Ashby claims that he went to the National Savings and Trust Co. and

The Government had in its possession at the time of the criminal trial a check for $35,000 drawn on the Riggs National Bank on Feb. 13 to replenish its supply of $1,000 bills (Petitioner's Exhibit 2). This information was not disclosed to Appellant until the habeas corpus proceeding. Nor did the

changed the thirty-five $1,000 bills into 1,750 $20 bills (Tr. 224, 254, 255, 259).

Government disclose the statement by Benjamin B. McCeney, Assistant Treasurer of the National Savings and Trust Co., that neither he nor Hunter Hooper, Executive Assistant at the Bank, recall the changing of the $1,000 bills into $20 bills (Government's Exhibit 4). Hooper testified at the Habeas Corpus proceeding that it would be impossible for the changing to occur without his knowledge unless the procedures of the Bank had been violated (H.C. Tr. 64, 70-71, 128). This information would have been available to the trial court but for the Government's failure to disclose the Riggs check and the McCeney statement. Appellant's counsel, Mr. Jacob Stein, filed two pre-trial motions for discovery which were opposed by the Government and denied by the Court.

Thus, the newly discovered evidence demonstrates that none of the events described by Landriscina could have taken place on February 12 and that the changing of the bills could not have taken place on either day unless the rules of the bank had been violated. This information would have been before the trial court and would have compelled a verdict in favor of Appellant, but for the Government's suppression of the Riggs check and the McCeney statement.

The Findings of Fact proposed by counsel for Levin at the Habeas Corpus hearing are based on the above analysis. They are attached to this brief as Exhibit A. The Findings which the court below actually made are attached as Exhibit B.

STATUTES INVOLVED

The Constitutional and statutory provisions involved are set out in the Appendix.

STATEMENT OF POINTS

1. The Court erred in stating that Appellant, Petitioner in the Court below, is not in custody.

2. The Court erred in failing to find that the admission by the Solicitor General as to the falsity of key testimony of a Government witness was newly discovered evidence.

3. The Court erred in failing to find that the Riggs check, the McCeney statement, and the recollections of Hooper and McCeney are significant and compelling discoveries.

4. The Court erred in failing to find that the record supports the contention that the Government suppressed evidence.

5. The Court erred in dismissing the petition for Writ of Habeas Corpus.

6. The Court erred in refusing to grant a new trial.

SUMMARY OF THE ARGUMENT

1. The admission of the Solicitor General, the Riggs check, and the McCeney statement constitute newly discovered evidence of a significant and compelling nature. This evidence establishes conclusively that the events leading up to and comprising the alleged act of larceny by trick could not have happened in the way that Landriscina described. Speculation

about other ways in which the payment could have been made or other times at which meetings might have taken place cannot provide the basis for sustaining a criminal conviction. Appellant should be granted a new trial on either of two grounds: newly discovered evidence pursuant to 18 U.S.C. Rule 33 or use of perjured testimony by the prosecution pursuant to 28 U.S.C. § 2255.

2. Appellant is presently in custody on bond as the result of a conviction which the Government obtained by suppressing evidence crucial to his case. This evidence was in the possession of the Government at the time of the criminal trial but no disclosure was made to Appellant's counsel. The failure to disclose is incredible in the light of the fact that Appellant's counsel made two motions for discovery and that the prosecution must have known the importance of the evidence in that it conclusively establishes the falsity of Landriscina's testimony. This breach of duty and knowing use of perjured testimony in violation of Appellant's right to due process of law is more than sufficient to justify the grant of a writ of habeas corpus.

ARGUMENT

1. THE ADMISSION OF THE SOLICITOR GENERAL, THE RIGGS CHECK, AND THE McCENEY STATEMENT CONSTITUTE NEWLY DISCOVERED EVIDENCE OF A SIGNIFICANT AND COMPELLING NATURE WHICH REQUIRES, IN THE INTEREST OF JUSTICE, THAT APPELLANT BE GRANTED A NEW TRIAL.

We submit that had the newly discovered evidence which the Government concealed from Levin's counsel been before the trial court a directed verdict would have been required.

The suggestion of the trial court in its findings that the jury in the criminal case passed on the issues presented here on habeas corpus is, we think, completely untenable. The court found that the Government admission is not newly discovered evidence because there had been conflicting testimony at the criminal trial level on the issue of date of payment. This reasoning is curious. Previously it was possible to believe -- indeed, it appears that the jury did believe -- that Landriscina was telling the truth about making the payments on February 12 and 13. The Government admission is decisive. It removes the issue from the realm of jury discretion and evaluation of credibility of witnesses.

The Riggs check and the McCeney statement demonstrate that Landriscina's testimony -- with all of its elaborate detail about meetings in parks and exchanges of thousand dollar bills and twenty dollar bills -- is false. These two items are important in themselves and also in that they led to additional evidence which further substantiates the conclusion that the payment as described by Landriscina and Ashby never took place. Had the McCeney statement and the Riggs check been disclosed to counsel for Appellant during the criminal trial, he would have interviewed McCeney and Hooper and would have found that the changing of the thousand dollar bills could not have occurred without Hooper's knowledge unless the procedures of the bank were violated. If presented with this evidence, the jury would not have believed Landriscina and Appellant would never have been convicted.

The finding of the trial court that the falsehoods in Landriscina's testimony as to the date and manner of payment do not matter is equally untenable. What the trial court is doing in so finding is to rely upon the possibility that there could have been meetings entirely different from the ones testified to by Landriscina. Such speculations cannot be

indulged even in a civil trial and certainly not in the face of the presumption that a man is innocent unless proved guilty beyond all reasonable doubt.

The decision of the court below should be reversed and Appellant should be granted a new trial. The grounds for granting a new trial are either newly discovered evidence pursuant to 18 U.S.C. Rule 33, or use of perjured testimony by the prosecution pursuant to 28 U.S.C. § 2255. A new trial can be obtained under § 2255 in either of two ways. The first is to show knowing and wilful use of perjured testimony by the prosecution. In this event the significance of the perjured testimony need not be very great to support the grant of a new trial. The second way is to concentrate on the significance of the undisclosed evidence which demonstrates the testimony to be perjured. In this event it is sufficient to show that the prosecution was merely negligent in its failure to disclose. This view of § 2255 was enunciated as follows in Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961):

> ". . . the standard of how serious the probable effect of an act or omission at a criminal trial must be in order to obtain the reversal or, where other requirements are met, the vacating of a sentence, is in some degree a function of the

> gravity of the act or omission; the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play."

Significance of the newly discovered evidence is the only relevant factor when proceeding for a new trial under Rule 33 as this is a direct rather than collateral attack upon the judgment. United States v. West, 170 F. Supp. 200 (N.D. Ohio 1959), affirmed 274 F.2d 885 (6th Cir. 1960). We believe that both grounds are available to the Court as it is clear that the prosecution knew that the testimony of Landriscina was perjured and that the testimony was crucial to Appellant's case but chose to use that testimony to obtain a conviction and to conceal documents (i.e., the Riggs check and the McCeney statement) which conclusively prove the falsity of that testimony.

2. SINCE APPELLANT IS PRESENTLY IN CUSTODY ON BOND AS THE RESULT OF A CONVICTION WHICH THE GOVERNMENT OBTAINED BY SUPPRESSING EVIDENCE CRUCIAL TO APPELLANT'S CASE AND KNOWINGLY SEEKING THE CONVICTION ON THE BASIS OF PERJURED TESTIMONY, JUSTICE COMPELS THE GRANT OF A WRIT OF HABEAS CORPUS.

The trial court stated in its findings that Appellant is not in custody but on bond. We do not think this was the

ground for dismissal of the writ. However, if it was, it is clearly in error. Jones v. Cunningham, 371 U.S. 236 (1963), holds that the term "custody" as used in 28 U.S.C. § 2241 includes any kind of custody and is not limited to physical custody. In Jones the applicant for habeas corpus was on parole which the Court held involved restraint on liberty. The Court pointed out that the parolee may be imprisoned at any time if he violates parole. Appellant may likewise be imprisoned at any time because the bondsman may surrender him. He does not have to perform some affirmative act, as in the case of parole, which may cause his imprisonment. Thus, Appellant is in custody within the meaning of 28 U.S.C. § 2241.

The Riggs check and the McCeney statement were in the Government files at the time of the criminal trial. Despite two motions for discovery made by Appellant's counsel, the Government refused to disclose these documents, terming Appellant's attempt a "fishing expedition."

The prosecution must have been aware that these documents were crucial to Appellant's case and that they conclusively established the falsity of Landriscina's testimony.

Yet the prosecution concealed these documents and obtained the conviction on the basis of this testimony which they knew to be perjured.

The dictates of the law are clear in this instance. Habeas corpus is required by the record under the authority of Napue v. Illinois, 360 U.S. 264 (1959). The only difference between Napue and the case at Bar is that in the former the falsity of the Government witness was with respect to a collateral matter whereas in Appellant's case the false testimony goes to the heart of the evidence adduced against Appellant.

In Napue Chief Justice Warren, speaking for a unanimous Court, stated:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." (360 U.S. at 269.)

How much more obvious it is that the principle applies when the false testimony goes directly to the guilt or innocence of the accused.

We submit that in a case like this where there is so much evidence that discredits the character of the Government's

key witness, where the story fabricated by that witness is so inherently improbable and stands completely uncorroborated, and where the Government has in its possession documents which repudiate the testimony of that witness, it was the duty of the Government to make the admission which was later made by the Solicitor General and to disclose the documents which Appellant later obtained by subpoena. Instead of performing this duty, the Government concealed the documents which demonstrate the falsity of the testimony of its key witness and used that testimony to obtain a conviction. This breach of duty and violation of Appellant's right to due process of law is more than sufficient to justify the grant of a writ of habeas corpus.

CONCLUSION

Perhaps it is not the function of counsel in this Court to speculate as to what probably happened. But it is tempting to try. At the outset Landriscina, Olsen and Ashby were faced with the distressing fact that the Government had discovered that they had embezzled $35,000.00 which they received in $1,000.00 bills. Some plan had to be evolved which would enable them to keep the $35,000.00 and also to obtain the advantage which paid off so handsomely in the case of Landriscina of Government clemency as a reward for turning State's evidence. They selected Levin and paid him $17,500.00 in Union funds as a retainer.

They then testified at the trial that this $17,500.00 was not in fact payment for Levin's legal services but was a payment for his services in the criminal conspiracy. Such a payment would be necessary under the conspiracy agreement because the whole $35,000.00 was supposed to be utilized in the bribery operation. This part of the testimony is an admission that they embezzled not $35,000.00 from the Union but $52,500.00. The reward for this plan was extraordinarily munificent.

Landriscina still has his job as President of the Brooklyn local of the Union and has been permitted to plead guilty to a minor offense. Olsen was given a suspended sentence and Ashby was never indicted at all.

This seems an extraordinarily high price for the Government to pay for the shaky State's evidence turned in by the alleged accomplices who were witnesses for the prosecution.

Because of the strange circumstances of this case, the complete absence of any basis in the record to sustain a conviction, and the deliberate concealment by the Government of evidence crucial to Appellant's case, we urge this Court to afford Appellant relief by reversing the trial court and granting either a writ of habeas corpus or a new trial.

Respectfully submitted,

THURMAN ARNOLD
1229 - 19th Street, N.W.
Washington, D.C. 20036

Attorney for Appellant

Of counsel:

ARNOLD, FORTAS & PORTER
1229 - 19th Street, N.W.
Washington, D.C. 20036

August 30, 1965

APPENDIX

UNITED STATES CONSTITUTION

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE

Title 18 Rule 33

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Title 28 § 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
(c) The writ of habeas corpus shall not extend to a prisoner unless -
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.

Title 28 § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

ATTACHMENT TO BRIEF FOR APPELLANT

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Of Counsel:

ARNOLD, FORTAS & PORTER
1229 - 19th Street, N. W.
Washington, D. C. 20036

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Ex A

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In The

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Milton M. Levin, Petitioner v. Nicholas deB. Katzenbach, Respondent.	Habeas Corpus No. 95-65

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

A. Findings of Fact as to the Government's Admission that Landriscina Incorrectly Testified that he Made the First Payment to Petitioner on February 12, 1959

1. On May 10, 1963, the petitioner, Milton M. Levin, a New York attorney, was convicted in the United States District Court for the District of Columbia, Criminal No. 913-62, of larceny by trick. On June 21, 1963, the petitioner was sentenced to serve a prison term of six months to two years. 1/

1/ In making these findings the Court takes judicial notice of the transcript and complete record, including pre-trial motions, memoranda, and orders, in that criminal proceeding.

2. The testimony on which petitioner was convicted was for the most part that of alleged accomplices. The principal witness against petitioner was the president of the Brooklyn, New York Local of the Baker and Confectionery Workers' International Union, James Landriscina. Landriscina testified that early in January, 1959, at a meeting in New York petitioner agreed to "fix" Judge Hart of the District Court and the jury in a trial in which James G. Cross, president of the International Union, was charged with perjury. Landriscina testified that petitioner told him he could bribe the judge and jury for the sum of $35,000. (Tr. 6). Arrangements were made at the January meeting, according to Landriscina, to meet Cross in Washington in pursuance of the conspiracy to bribe. (Tr. 8).

3. Petitioner testified that he met with Landriscina in New York early in January. But petitioner said that the purpose of the meeting was to discuss retaining him as additional counsel in the trial of Cross and, perhaps, as a lobbyist (Tr. 668, 670-72, 678-80, 773-76).

4. Landriscina testified, and petitioner also, that petitioner met Cross and Landriscina at dinner at Gusti's Restaurant in Washington on February 4, 1959. Petitioner stated that the discussion at this meeting related solely to his employment as counsel for the Union. However, Landriscina testified that Petitioner offered to "fix" Cross' trial before Judge Hart for the sum of $35,000.

Landriscina testified that Cross then said he wanted to get his wife's consent to the payment. (Tr. 9-13).

5. Landriscina testified that there was a second meeting on February 5, 1959, at which Cross agreed to pay the $35,000 to petitioner to enable him to bribe the judge and jury in the perjury trial against Cross (Tr. 12, 14). Petitioner denied that a second meeting on February 5, ever took place. (Tr. 679).

6. Landriscina testified that on the morning of Tuesday, February 10, 1959, petitioner telephoned him from the Congressional Hotel in Washington. Landriscina testified that as a result of the telephone call they met in petitioner's room and petitioner said he must have $10,000 at once (Tr. 15-16).

7. Landriscina testified that on Wednesday evening, February 11, 1959, he telephoned petitioner at the Congressional Hotel and arranged a meeting for the next day, February 12, 1959, at the Statler Hotel, at which time he promised to bring $10,000 to deliver to petitioner (Tr. 17-19).

8. Landriscina testified that on Thursday, February 12, 1959, between 11:00 and 11:30 a.m., he met petitioner at the Statler Hotel. He said they walked to a nearby park and, while seated on a bench, Landriscina gave petitioner an envelope containing ten $1,000 bills. (Tr. 19-20, 22).

9. Landriscina testified that petitioner telephoned him at 12:00 noon on that same day, Thursday, February 12, 1959, and asked Landriscina to meet petitioner again at the Statler. Landriscina said that they met shortly afterwards and petitioner returned the money to Landriscina and asked for smaller denominations. (Tr. 22-23).

10. Landriscina testified that between 12:45 and 1 p.m., he and petitioner met again at the Statler Hotel, for the third time that day, Thursday, February 12, 1959. Landriscina testified that at this time he gave the petitioner $10,000 in $20 bills in place of the ten $1,000 bills given to petitioner that morning. (Tr. 24-25). It was at this meeting, Landriscina testified, that he and petitioner arranged to meet in front of the Statler Hotel at 5:00 p.m. the next day, Friday, February 13, 1959. Landriscina testified that he and petitioner had no contact or communication between this meeting on February 12th and the next meeting at the Statler Hotel at 5:00 p.m. on Friday, February 13, 1959. (Tr. 25).

11. On February 13, 1959, at 5:00 p.m., Landriscina testified, he again met petitioner at the Statler Hotel; they again walked to the same park; and Landriscina gave petitioner $25,000 in $20 bills (Tr. 25-26).

12. The government presented two witnesses through whom it attempted to show how Landriscina obtained the $35,000 which he testified that he paid to petitioner. These were Peter H. Olson, Secretary-Treasurer of the International Union, and Richard E. Ashby, Comptroller of the Union. Their testimony contradicted Landriscina's testimony that he made a payment to the petitioner on February 12th. They both testified that the check was cashed by Olson on February 13th (Tr. 197, 224). Ashby testified that he first received the money from Olson on the 13th and paid part of it to Landriscina. Ashby testified that later the same day he got the money back from Landriscina, and, sometime between 11:30 a.m. and 12 noon, went to the National Savings and Trust Company and changed the entire amount into $20 bills. (Tr. 224, 254, 255, 259).

13. Government Exhibit 5 in the aforementioned criminal proceedings (Petitioner's Exhibit 1 in the present habeas corpus proceedings) is a photostatic copy of the $35,000 cancelled check identified by Olson as the source of the money paid to Landriscina, which Landriscina in turn testified that he paid to petitioner. There was no other evidence in the case of the source of the money which Landriscina testified that he received from Olson and paid to petitioner. The stamp on the check shows that it was cashed on February 13, 1959. Therefore, the evidence of record does not show any possibility of a payment by Landriscina to petitioner on February 12, 1959. Considering only the evidence of record, it is not possible that such a payment took place.

14. Nevertheless, in his summation to the jury, Government counsel emphasized Landriscina's testimony of a payment to the petitioner of $10,000 on February 12th, 1959, and a second payment of $25,000 on February 13, 1959, and urged the acceptance of this testimony to the jury. (Tr. Arg. 10, 11; Exhibit A attached to the Petition For Habeas Corpus).

15. On the basis of Landriscina's testimony and of the Government's position in the case, the Court instructed the jury, in part, as follows:

> "To constitute grand larceny under the law, the amount involved must be at least $100 or more. The charge in this case mentions the money involved as $35,000. <u>There is testimony by Mr. Landriscina to the effect that $10,000 of this money was turned over to the defendant on one day and $25,000 the next day</u>. On the other hand, some other witnesses testified that all the money that was turned over to Mr. Landriscina was received by him on one day, namely, February 13th, $10,000 at one time and $25,000 at a different time during the same day. Of course, as I have already told you, Mr. Levin, the defendant, denies the receipt of any of this $35,000.
>
> "Now, you are told this, it would be sufficient to convict, for the government to prove beyond a reasonable doubt that <u>either of these sums</u> were turned over to the defendant, since each was over $100, provided you find that the charge is otherwise established beyond a reasonable doubt."
> (Tr. 1064-1065) (emphasis added).

The Newly Discovered Evidence

16. The Solicitor General has now admitted that Landriscina's testimony that he made a payment to petitioner on February 12, 1959 is incorrect. In his Opposition to the Petition for Certiorari (which petition was filed after petitioner's conviction was affirmed by the United States Court of Appeals for the District of Columbia) the Solicitor General says:

> "Landriscina testified, apparently incorrectly, that he made the first payment of $10,000 on February 12." (emphasis added).

17. Had the Government made this concession at the trial, the Court would not have instructed the jury that they might find that Landriscina made a first payment to the petitioner on February 12th and a second payment on February 13th. Indeed, the Court would have been compelled to instruct the jury that the Government had failed to establish its burden of proof with respect to the allegation of any payment to the petitioner on February 12th.

18. The effect of the admission would have gone further and would have conclusively established, that there could have been no payment to petitioner either on February 12th, or on February 13th. This is because the record shows that if the meeting on the 12th did not take

place there is no possibility that the alleged meeting on the 13th occurred. Landriscina testified that it was on February 12th that he arranged to meet petitioner at the Statler Hotel on February 13th to receive the remaining $25,000.

Landriscina also testified that he did not see petitioner or have any contact with him between the two meetings. Therefore, in the absence of a meeting on February 12th, petitioner would have had no knowledge of where to go to meet Landriscina the next day (Tr. 18, 19, 24, 25). There is thus no evidence in the record to show when, where, or how the alleged February 13th meeting was arranged. The only testimony that would have provided such evidence has been conceded by the Government to be "incorrect."

Findings As To Previously Undisclosed Evidence

19. In March, 1961, the Government obtained, and had in its possession at the time of the criminal trial of the petitioner (H.C. Tr. 212-213), a check for $35,000 drawn by the National Savings and Trust Company, against its account in the Riggs National Bank, on February 13, 1959. Mr. Hunter Hooper, the Executive Assistant at the National Savings and Trust Company, testified in the present habeas corpus proceeding that this check had been drawn by him on February 13, 1959, to replenish his bank's supply of $1,000 bills which had been reduced when the bank had,

that same day, February 13, 1959, cashed the $35,000 check of the International Bakery and Confectionery Workers' Union for Peter H. Olson, the Secretary-Treasurer of the Union. (H.C. Tr. 56-57). Mr. Hooper was responsible for keeping an account of and maintaining the banks supply of large currency bills. (H.C. Tr. 50-51).

20. Mr. Hooper testified that the Riggs check (Petitioner's Exhibit 2) would not have been drawn if Mr. Ashby, or anyone, had returned to the National Savings and Trust Company the thirty-five $1,000 bills paid out to Mr. Olson the same day (H.C. Tr. 59). Mr. Hooper testified that the $1,000 bills were not, to his knowledge, returned to the bank that day, or at any time in the near future, (H.R. Tr. 59). Mr. Hooper also testified that it was impossible for the thirty-five $1,000 bills to have been brought back to the bank and changed into $20 bills without his knowledge, unless the rules and normal procedures of the bank had been disobeyed by the bank's tellers (H.C. Tr. 64, 70-71, 129).

21. Mr. Benjamin B. McCeney, the Assistant Treasurer of the National Savings and Trust Company, testified in the present habeas corpus proceeding that, to his knowledge based on his official position of the bank and his supervision of the tellers, the thirty-five $1,000 bills paid to Mr. Olson on February 13, 1959, were not returned to the bank on that day or any reasonable time thereafter (H.R. Tr. 134-136).

22. The Government obtained in September, 1962, and had in its possession at the time of the criminal trial of the petitioner (H.C. Tr. 194, 198, 214), a written statement signed by Mr. McCeney in which McCeney stated that:

> "I hereby recall Mr. Olson coming in with a $35,000 check, dated February 13, 1959 to be cashed but I do not recall a telephone call from Mr. Olson to arrange the cashing of this check. Mr. Olson came in and I took him to Mr. Hooper, who, at that time, was running one of the savings windows and handling the large cash, to cash this check which he did in thousand dollar bills. I do not recall Mr. Ashby coming in to change the thousand dollar bills to smaller ones. If he did I would have taken him back to Mr. Hooper because he was handling the large bills. Mr. Hooper says he does not recall cashing this money into smaller bills that day. Our auditors checked the records for teller sheets of Mr. Hooper for February 13, 1959 and could not locate them as it is our policy to keep our sheets not later than two years. It is my understanding from the auditors that we do have the 1960 teller sheets in our files." (emphasis added) (Government Exhibit 4 in the present habeas corpus proceeding.)

23. The Government failed to disclose to the attorney who was representing the petitioner in the aforementioned criminal prosecution either of the aforementioned items of evidence, the Riggs check (Petitioner's Exhibit 2), or the McCeney statement (Government Exhibit 4 in the present habeas corpus proceeding). Moreover, pretrial motions filed by the defense attorney on January 11, 1963, about three and

one half months prior to the commencement of the criminal trial, which should have produced the above two items and the information contained therein, were opposed by the Government and denied by the Court. (Defendant's Motion for Discovery and Inspection Under Rule 16 of the Federal Rules of Criminal Procedure, January 11, 1963; Defendant's Motion for Bill of Particulars, January 11, 1963; Government's Answer and Opposition to Defendant Levin's Motion for Discovery and Inspection, January 22, 1963; Government's Answer and Opposition to Motion for Bill of Particulars, January 22, 1963; Order of Judge Sirica, January 28, 1963).

24. Mr. Jacob Stein, the attorney who defended the petitioner in the aforementioned criminal prosecution, testified in the present habeas corpus proceeding that he did not see the Riggs check prior to or during the criminal trial, and did not become aware of its existence. (H.C. Tr. 172-173, 183). He further testified that he had been informed by the bank officials that any bank records pertaining to transactions involving large bills had been destroyed (H.C. Tr. 179, 190).

25. The Government thus failed and refused to disclose to the defense attorney, and the defense attorney never became aware of, the Riggs check and the McCeney statement, two items of evidence which establish:

(a) That the thirty-five $1,000 bills were not exchanged into $20 bills at the National Savings and Trust Company on February 13, 1959, as testified by Ashby and Landriscina;

(b) That Ashby and Landriscina were therefore perjuring themselves;

(c) That petitioner could not have been paid $35,000 in $20 bills on February 13, 1959;

(d) That petitioner was innocent of the criminal charges.

26. The defense attorney's failure to discover the Riggs check and the McCeney statement cut him off from an important lead through which he could have discovered the testimony of Hooper and McCeney brought out in the present habeas corpus proceeding. This testimony has the same effects described in Finding 24, supra.

II. CONCLUSIONS OF LAW

1. The petitioner is entitled to a writ of habeas corpus; and to an order directing that his conviction be set aside, that the indictment against him be dismissed, and that he be released from custody, bond, and restriction of any kind.

The conviction of the petitioner was based, at best, on the inconsistent and suspect testimony of persons who admitted to participating in a conspiracy to wrongfully take Union funds and to bribe a judge and jury. In addition, Landriscina had admitted to participating in a conspiracy to commit perjury in the trial of James Cross, president of the Bakery and Confectionery Workers' International Union. (United States v. James G. Cross, Crim. No. 914-62, Apr. 4-5, 1963, Tr. 37).

2. It has now been disclosed that the Government, following the conviction of the petitioner on the basis of such testimony, has conceded that key testimony of the principal witness, Landriscina, urged by the Government of the criminal trial and accepted by the Court as the basis for an instruction to the jury, was incorrect. In addition, it has been disclosed that the Government failed and refused to disclose to the attorney representing the petitioner in the criminal proceeding two items of evidence, the Riggs check (Petitioner's Exhibit 2) and the McCeney statement (Government Exhibit 4 in the present habeas corpus proceeding).

3. In these circumstances, the conviction must be set aside. First, the new matters now disclosed make it evident that the series of events testified to in the record, and on the basis of which the petitioner was convicted,

could not possibly have taken place. As the Government now has conceded, Landriscina could not have paid petitioner $10,000 on February 12, 1959, as he testified. Without the meeting of February 12, 1959, there is nothing in the record to support the allegations that there was a meeting and payment on February 13, 1959. Moreover, the Riggs check and the testimony of the bank officials in connection therewith establish that the thirty-five $1,000 bills allegedly withdrawn from the National Savings and Trust Company to pay to petitioner could not have been exchanged at the bank for $20 bills on February 13, 1959, as Landriscina and Ashby testified. It cannot be suggested that Landriscina may have been confused about the dates; or that the meeting of February 13th was arranged at another time and place than those testified to by Landriscina; or that the $1,000 bills were exchanged for $20 bills at some other bank than that testified to by Ashby. The testimony and the evidence cannot be rewritten to support the conviction, and the series of events cannot be recreated on the basis of events which might have happened but concerning which there is no testimony or evidence. The conviction can be sustained, if at all, only on the basis of the record as it now stands. And that record does not support the conviction in light of the disclosures made in this habeas corpus proceeding.

4. The Court may not speculate on whether the jury relied upon or disregarded the testimony now conceded to be incorrect. Empire Oil and Gas Corporation v. United States, 136 F. 2d 868. A conviction upon perjured testimony may not stand and there is no obligation upon the petitioner to prove that the prosecutor knowingly used such testimony. United States v. West, 170 F. Supp. 200, 207, aff'd., 274 F. 2d 885.

5. Moreover, even if the Government's admission as to the incorrectness of Landriscina's testimony did not require an acquittal, and even if the Riggs check and the testimony of the bank officials in connection therewith did not conclusively establish that the $1,000 bills were not changed for $20 bills, there can be no question that these matters would have influenced the jury, Indeed, it need not be shown that they would have influenced the jury; it is sufficient that these matters "would tend to exculpate" the petitioner. Ellis v. United States (United States Court of Appeals for the District of Columbia, No. 18,424, February 25, 1965).

Respectfully submitted,

Thurman Arnold
1229 Nineteenth Street, N. W.
Washington, D. C. 20036

Attorney for Petitioner

BRIEF IN SUPPORT
OF THE
ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Had the admission of that of the Solicitor General made to the effect that Landriscina's testimony about a payment to the petitioner on February 12, 1959 was incorrect, been before the jury, there would have no possibility of conviction for a payment on that day. This in itself would have been sufficient to grant habeas corpus because the Court permitted the jury in its instruction to find that there was such a payment.

However, the effect of the admission goes further. If there was no payment on February 12, there could not have been a payment on February 13, 1959. This is because all of the alleged arrangements to meet the petitioner on February 13 at the Statler Hotel were according to Landriscina's testimony made at the meeting on February 12th. There was no contact according to Landriscina between him and the petitioner between the meeting on February 12 and the meeting on February 13. Therefore, when the Solicitor General admits that there was no payment made on February 12th, there would have been no way of the petitioner's knowing where to go to meet Landriscina on February 13th.

In addition to this admission, there were two documents which the prosecuting attorney had in his possession prior to the trial and did not disclose which would have led Mr. Stein to discover that it was highly improbable, that indeed it was probably impossible, that the 35 $1,000 bills had ever been changed into $20 bills and delivered to petitioner. These two documents consisted petitioner's Exhibit 2 and Government Exhibit 4 in habeas corpus hearing.

Petitioner's Exhibit 2 is a check for $35,000 drawn with the National Savings and Trust on Riggs National Bank. Mr. Hooper, who was responsible for keeping account of and maintaining the bank's supply of large bills (H.C. Tr. 50-51), testified that this check has gone on the Riggs Bank to replace the 35 $1,000 bills which had been given to Mr. Olson when he cashed the Union's check for $35,000. And Mr. Hooper further testified that it was impossible that the 35 $1,000 bills should have been brought back to the bank and changed into $20 bills without his knowledge. (H.C. Tr. 70-71, 129).

Mr. Stein who represented petitioner at the trial was misled into thinking that the bank had a record of the numbers of $1,000 bills. He therefore went to see Mr. McCeney to question him with regard to the transaction of the $35,000 check cashed on February 13. (H.C. Tr. 182). He learned that there was no record of the numbers of the bills and therefore abandoned the inquiry. (H.C. Tr. 179).

Had Mr. Stein,who was attorney for petitioner's trial, known of the check (H.C. Ex. 2) which Mr. Hooper had drawn on the Riggs Bank to replace the thirty-five $1,000 bills drawn out by Mr. Olson, it would have led him to discover Mr. Hooper's testimony. That testimony would have established, or at least strongly tended to prove, that the thousand dollar bills had never been changed into twenty dollar bills and returned to the National Savings and Trust Company on the 13th of February.

And even more important was the concealment of Government's Exhibit 4 in the habeas corpus proceeding in which Mr. McCeney stated:

> "I do not recall Mr. Ashby coming in to exchange the $1000 bills to smaller ones. If he did, I would have taken him back to Mr. Hooper because he was handling the large bills. Mr. Hooper said he does not recall changing this money into smaller bills." (Government Exhibit 4 in the present habeas corpus proceeding.)

Had this document been available to Mr. Stein, it would have led to his discovery that Mr. Hooper's testimony that the very unusual transaction of exchanging thirty-five $1,000 bills into 1,750 $20 bills could not have occurred without his knowledge unless the rules and procedures of the bank had been disregarded. This testimony would have demolished the Government's case.

Mr. Stein did what he could to uncover this evidence. He made a motion for discovery and inspection under Rule 16 of the Federal Rules of Procedure. He asked for inspection of records and correspondence:

> " . . . obtained . . . from persons, firms, organizations and corporations, by seizure or process in connection with the grand jury investigation which resulted in this indictment, or otherwise in connection with this proceeding, and which are relevant to any matter alleged."

The Government opposed on the grounds that this was a "fishing expedition". The Government's opposition was sustained. As a result, the only document shown to the petitioner before the trial was the $35,000 check cashed by Olson, for which he received thirty-five $1,000 bills on February 13, 1959.

We have made the tabular analysis which follows, of the testimony of the witnesses, both at the trial and at the habeas corpus proceeding, with respect to the meetings between Landriscina and petitioner. We submit that this analysis establishes that Landriscina, the only witness to give direct testimony as to payments to petitioner, was guilty of perjury.

Landriscina's Testimony With Respect to the Payments Made to Petitioner and Times and Places on Which They Were Made

Feb. 10	Feb. 11	Feb. 12	Feb. 13
One Telephone Call and one Meeting Petitioner telephoned Landriscina from the Congressional Hotel in Washington. As a result Landriscina went to Petitioner's room in the Congressional Hotel and was told by Petitioner that he must have $10,000 at once (Tr. 15-16).	One Telephone Call. No Meeting On Wednesday evening Feb. 11 Landriscina telephoned Petitioner at the Congressional Hotel and arranged for meeting next day (Feb. 12) at the Statler Hotel. He promised to bring $10,000 (Tr. 7-19).	Three Meetings. One Telephone Call On Feb. 12 Landriscina met Petitioner as arranged the day before at the Statler Hotel between 11 and 11:30 A.M.. They walked to a nearby park and while seated on a bench Landriscina gave Petitioner an envelope containing 10 $1,000 bills (Tr. 19-20, 22). At noon on the same day Petitioner telephoned Landriscina to meet again at the Statler. They met shortly afterwards. Petitioner returned the $1,000 bills to Landriscina and asked for smaller denominations (Tr. 22, 23). Between 12:45 and 1:00 P.M. Landriscina and Petitioner met at the Statler. Landriscina gave Petitioner $10,000 in $20 bills. At that time Landriscina arranged to meet at the Statler at 5:00 PM the next day. Landriscina testified that he and Petitioner had no contact between this meeting at the Statler at 12:45 P.M. Feb. 12 and their meeting the next day (Feb. 13) at 5:00 P.M.	One Meeting On Feb. 13 at 5:00 P.M. Landriscina testified he again met Petitioner at the Statler Hotel as arranged the day before. They again walked to the same park and Landriscina gave Petitioner $25,000 in $20 bills (Tr. 25-26).

Comment: The above analysis shows that it would have been impossible for a meeting to occur on February 13, if, as the Solicitor General concedes, there had been no meeting on February 12. This is because, according to Landriscina's testimony, the meeting on February 13 was arranged on February 12 and there was no contact between Landriscina and the petitioner between the two meetings. Therefore, petitioner would not have known where to go on February 13, if payment on February 12 had not occurred.

Testimony of Mr. Hunter Hooper, Executive Assistant of National Savings and Trust Company, Which Contradicts Both Landriscina and Ashby.

February 13

Mr. Hooper was responsible for keeping an account of and maintaining the bank's supply of large currency bills (Habeas Corpus Tr. 50-51). He testified that on February 13, he drew a check on the Riggs National Bank to replace the thirty-five $1,000 bills which had been paid out to Mr. Olson. The check was cashed on February 13. To the best of Mr. Hooper's knowledge, the $1,000 bills were never returned to the bank that day. He further testified that changing thirty-five $1,000 bills into 1,750 $20 bills would have been an unusual occurrence. No single teller would have had that many $1,000 bills. Had the rules and procedures of the bank been observed, it would have been impossible for such a transaction to have occurred without his knowledge.

On cross-examination, the government elicited a statement from Mr. Hooper that it would have been "possible" for this unusual occurrence to have taken place without his knowledge. On redirect examination, the following question was asked:

> "If the routine procedures of the bank had been followed with respect to the cashing of -- the changing of 35 $1,000 bills into 1,750 $20 bills, if these procedures had been followed, would it have been possible for you to have known about it?
>
> "Mr. Altshuler: I object to the question on the grounds --
>
> "The Court: What was your answer?
>
> "THE WITNESS: I said it would not have been possible for me not to have known about it.
>
> "The Court: I thought you testified on your direct examination that other tellers could have done it?

"THE WITNESS: Well, they could have, but I would have known about it, that's the point. I would have known about it.

"The Court: Is that all?

"Mr. Arnold: That is all."

(Official Transcript - Habeas Corpus Proceeding 95-65, pp. 129-30).

Olson's Testimony Which Contradicts Landriscina

(Olson was Secretary-Treasurer of the Union)

February 13

Olson cashed a check for $35,000 receiving 35 $1,000 bills at the National Savings and Trust Company of February 13 (Tr. 197, 224). Olson was shown the check for $35,000 drawn on the union account (Government's No. 5 in the File Record; Petitioner's No. 1, Habeas Corpus). He said that he had received the check on February 12 and cashed it on February 13 at the National Savings and Trust, receiving 35 $1,000 bills (Tr. 197).

As a result of a conversation with Cross he gave Landriscina on February 13, ten $1,000 bills. The other 25 bills, he put back in the envelope and gave them to Mr. Ashby to return them to the safe (Tr. 198-99).

Testimony of Ashby, Comptroller of the Union, Contradicting Landriscina.

February 13

Ashby testified that the $35,000 check drawn on the Union was cashed by Olson on February 13. Thirty-five $1,000 bills were received and given to Ashby, who put them in the

safe. Later, ten $1,000 bills were taken out by Ashby and given to Landriscina in Olson's presence. Later on the 13th, Landriscina brought back the ten $1,000 bills given to him by Ashby and he said the bills were too large.

Ashby then took the 35 $1,000 bills to the National Savings and Trust Company and had them all changed to smaller bills.

Ashby went back to the office and gave $10,000 in $20 bills to Landriscina. He put the other $25,000 in $20 bills in the safe.

Later the same afternoon, Landriscina came back and Ashby gave him the balance of $25,000 in $20 bills (Tr. 224, 254, 255, 259).

COMMENT: This testimony shows that the check for thirty-five $1,000 bills was not cashed until the 13th. Apparently Landriscina, noting the date of February 12 on the check, thought it had been cashed on February 12. When he was proved to be in error, Ashby, in order to support Landriscina's story, had to testify that he gave $10,000 in $20 bills to Landriscina in the morning and the balance in $20 bills in the afternoon. There is no rhyme or reason for this conduct, as was testified to by Ashby. If Ashby had changed the entire $35,000 into $20 bills in the morning, and if he knew that petitioner wanted all of it that day, why didn't he bring it all at once? Ashby's testimony obviously was perjured.

Testimony of Mr. Benjamin McCeney, Assistant Treasurer of the National Savings and Trust Company, Taken on Hearing of Habeas Corpus, Contradicting the Testimony of Both Landriscina and Ashby.

February 13

Mr. McCeney testified that to his knowledge, based on his official position at the bank, the unusual transaction of the changing of thirty-five $1,000 bills into 1,750 $20 bills had not occurred and that the $1,000 bills were not returned to the bank on February 13 or any reasonable time thereafter. (Habeas Corpus Tr. 134-136).

COMMENT ON HUNTER HOOPER:

His testimony shows that it is highly improbable and almost impossible to believe that thirty-five $1,000 bills could be exchanged for 1,750 $20 bills on February 13th.

COMMENT ON McCENEY:

While it is possible that the unusual transaction of exchanging thirty-five $1,000 bills for 1,750 $20 bills could have occurred without McCeney's knowledge, it is so highly improbable that had this evidence been produced, the jury would have been compelled to acquit.

The record raises the following questions which only the Government can answer:

1. Why did the Government permit Landriscina, a confessed conspirator to embezzlement, and also a conspirator in a scheme to bribe a jury, to plead guilty to the minor crime of obstructing justice and to escape with a mere fine

which permitted him to continue as President of the very union from which he had embezzled the money?

2. Why did the Government wait until after the conviction to concede the incorrectness of the central parts of Landriscina's testimony?

3. Why did the Government withhold from the defense the Riggs check and the McCeney statement, both or either of which would have led to the discovery and testimony of Hooper and McCeney that the thirty-five $1,000 bills could not have been exchanged for 1,750 $20 bills on February 13th?

Whatever the answers to these questions may be, it is clear that the matter was not disclosed and should have been disclosed at the trial of petitioner. The government, in prosecuting a case, has a duty of fairness and candor. Napue v. Illinois, 360 U.S. 264; United States v. Kyle, 297 F. 2d 507; People v. Winman, 287 F.2d 275, 279. That duty was not fulfilled in this case.

In the circumstances of this case, considering the character of the principal witness against the petitioner, the inconsistencies of the testimony of the prosecution witnesses, the possibility that a directed verdict of acquittal might have been required had the present disclosures been made at the criminal trial, and the lengthy ordeal to which the petitioner was subjected in a trial which took ten days, the interests of justice will be

served by an order dismissing the indictment and releasing and discharging the petitioner.

Respectfully submitted,

Thurman Arnold
1229 19th Street, N.W.
Washington, D. C.

Attorney for Petitioner

Dated: May 10, 1965

CERTIFICATE OF SERVICE

I, Thurman Arnold, hereby certify that the foregoing Findings of Fact and Conclusions of Law, and Brief in Support Thereof, has been served on Respondent by delivering a copy thereof this 10th day of May, 1965, to the following:

Oscar Altshuler, Esquire
Assistant United States Attorney
United States Courthouse
Washington, D. C.

Thurman Arnold

C. B

FILED
JUN 11 1965
HARRY M. HULL
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILTON M. LEVIN,
Petitioner
v.
NICHOLAS deB. KATZENBACH,
Respondent.

Habeas Corpus No. 95-65

This matter having come on for hearing before the court, and upon consideration of the record herein, of the evidence adduced at the hearing, and of the records and proceedings in Criminal Case No. 913-62 (and argument of counsel having been waived), the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On November 1, 1962 petitioner, Milton M. Levin was indicted for grand larceny by trick of $35,000 (22 D.C.Code 2201). He was subsequently found guilty as indicted by a jury on May 10, 1963 and on May 21, 1963, following denial of his motion for a new trial, he was sentenced to serve a term of six months to two years.

2. The Court of Appeals affirmed the conviction on June 30, 1964. Levin v. United States, 338 F.2d 265; petition for rehearing en banc was denied on September 22, 1964; and the Supreme Court on February 1, 1965 denied certiorari, 379 U.S. 999. There is now pending in the Court of Appeals a motion by petitioner for stay of mandate pending disposition of the present action.

3. The petitioner is not in custody but on bond. On February 25, 1965 he filed through retained counsel the present petition seeking to have his conviction vacated. He claims it was obtained upon untrue testimony. The petition makes application for a Writ of Habeas Corpus pursuant to 28 U.S. Code 1651(a), 2255, or in the alternative for an order vacating the conviction and granting a new trial under Rule 33 of the Federal Rules of Criminal Procedure. An amendment to the petition was filed on March 8, 1965. Consideration will first be given to the petition as filed February 25, 1965, and later the amendment will be taken up.

4. In the petition in a paragraph headed "Introductory Statement" on page 3 it is stated:

> The ground for this petition is an admission made by the Government in its opposition to certiorari. That admission is to the effect that at least half of the testimony relied upon by the Government to obtain the conviction is untrue.

5. The alleged admission appears as footnote 3 in the brief for the United States in the Supreme Court in opposition to Levin's petition for certiorari. It reads:

> Landriscina testified, apparently incorrectly, that he made the first payment of $10,000 on February 12.

6. The statement of the Government in footnote 3 in its brief in opposition in the Supreme Court is not newly discovered evidence. At the trial, the Government introduced testimony by Landriscina that he gave $10,000 in small bills to Levin on the morning of February 12, 1959, and the balance ($25,000) of the agreed $35,000 at about 5 p.m. on Friday, February 13, 1959. But as pointed out in footnote 4 in the opinion of the United States Court of Appeals in this case, 338 F.2d 265 at page 269:

> Other witnesses for the Government through whom Landriscina got the $10,000 in small bills gave testimony indicating that Landriscina did not receive the $10,000 until the morning of Friday, February 13, 1959. The jury thus could infer, if it credited this testimony and that of Landriscina that he paid the $10,000 to the appellant [Levin], that Landriscina was mistaken as to the date and that the transfer took place on February 13 instead of February 12.

7. The theory of counsel for Levin is that it would have been impossible for Landriscina and Levin to have met on February 13, 1959 as Levin could not have known where to meet Landriscina on that date. Endeavoring to sustain his theory, counsel refers to Landriscina's testimony that the place of his meeting with Levin for February 13 was fixed at their meeting on February 12, and then counsel states, apparently inaccurately, that the Government by footnote 3 to its brief referred to above in paragraph 5 conceded that Landriscina and Levin did not meet on February 12. From this he concludes that no meeting

took place on February 12 or 13 and hence that neither $10,000 nor $25,000 was received by Levin.

8. The count under which Levin was convicted alleges that the larceny was committed "on or about February 13, 1959." At the trial there was testimony of a series of meetings and telephone conversations between Landriscina and Levin, both in New York and the District of Columbia. When Landriscina testified at the trial it was more than four years after these meetings and conversations. In the nature of things, his recollection may not have been exact in all particulars. However, the jury heard all the evidence, observed the witnesses, determined their credibility, drew reasonable inferences from proven facts, and found Levin guilty beyond a reasonable doubt. The court concludes that there is nothing in the petition as filed February 25, 1965 warranting the granting of any relief.

9. On March 8, 1965 counsel for Levin filed an amendment to the petition for writ of habeas corpus. It reiterates the charge in the petition that Landriscina gave untrue testimony. In addition it charges that the trial prosecutor suppressed evidence which would have proven that the thirty-five one thousand dollar bills obtained from the National Savings and Trust Company by Mr. Olson of the Bakery and Confectionery Workers' International Union of America "were never changed into the denominations required by petitioner" (Levin), and that the trial prosecutor "instead of disclosing this fact * * * made the Bank give him its records and suppressed them."

10. In discussing these serious charges some background is necessary. First, Petitioner's Exhibits 1 through 10 herein will be taken up. They are copies of bank records which the attorney for Levin claims were suppressed. None of these records were obtained from the bank by the trial prosecutor.

11. Floyd Marzo, a compliance officer of the Department of Labor, pursuant to a Labor Department investigation, obtained from the National Savings and Trust Company copies of the records which constitute Petitioner's Exhibits 1 through 10:

> (1) a check of $35,000 which the Bakery and Confectionery Workers' International Union of America gave to Mr. Olson and which Mr. Olson cashed on February 13, 1959 at the National Savings and Trust Company, receiving therefor thirty-five $1,000 bills;
>
> (2) a check dated February 13, 1959 in the amount of $35,000 drawn by the National Savings and Trust Company on the Riggs National Bank for cash;
>
> (3) a teller settlement sheet of the National Savings and Trust Company dated March 4, 1960;
>
> (4) a teller settlement sheet of said bank dated March 7, 1960;
>
> (5) a teller settlement sheet of said bank dated March 30, 1960;
>
> (6) a teller settlement sheet of said bank dated March 31, 1960;
>
> (7) a deposit slip of said bank dated March 31, 1960 showing a deposit to the credit of the Union heretofore mentioned;
>
> (8) a deposit slip of said bank dated March 7, 1960 showing a deposit to the credit of said Union;
>
> (9) a statement of said bank of account of said Union as to transactions from March 17, 1960 through March 31, 1960; and
>
> (10) a statement of said bank of account of said Union of transactions from February 29, 1960 through March 16, 1960.

12. The officer of the Department of Labor who obtained copies of the records described in the above paragraph was assigned to the grand jury investigating the Levin Case. The trial prosecutor was government counsel before that grand jury. Sometime in July 1961 the copies of records obtained by the officer of the Department of Labor as above stated came through said Department to the trial prosecutor, then the government attorney before the grand jury.

13. Of these ten copies of records constituting Petitioner's Exhibits 1 through 10, eight relate to occurrences in 1960 more than a year subsequent to the date of the larceny of which Levin was convicted. These eight are his Exhibits 3 through 10. His Exhibit No. 1 — a copy of the Union check to Olson — was exhibited prior to Levin's trial to his trial attorney, Mr. Stein. This was under a court order pursuant to Mr. Stein's motion for discovery. This leaves for discussion Petitioner's Exhibit 2. It is dealt with in the paragraph which follows.

14. After the National Savings and Trust Company had cashed the check of the Union made out to Olson for $35,000 on February 13, 1959, giving therefor thirty-five $1,000 bills, the bank desired to replenish its own supply of $1,000 bills. To do so, the National Savings and Trust Company on the same day — February 13, 1959 — drew its check payable to the order of the Riggs National Bank (for cash) for $35,000 (Petitioner's Exhibit 2). Counsel for Levin claims that this check is an important piece of evidence.

He argues that if the thirty-five $1,000 bills given to Olson had been returned to the bank for bills of smaller denomination there would have been no necessity for the National Savings and Trust Company to have replenished its supply of $1,000 bills. However, this argument is not well founded. The evidence indicates that when need for such replenishment arises prompt action is taken to meet that need and "a runner is always used" (Transcript, page 57). A bank employee testified of the replenishing here involved:

> I had to replenish these as soon as possible because we could have had another request the same day for large bills and we would have been short. So we replenished these the same day that we paid them out * * * (Transcript, page 56. Emphasis supplied.)

15. The trial prosecutor did not furnish Levin's trial attorney with a copy of the check given by the National Savings and Trust Company to the Riggs National Bank in the replenishing operation just related. (Petitioner's Exhibit No. 2.) However, Levin's trial counsel, aware prior to trial that the National Savings and Trust Company had cashed the $35,000 Union check made out to Olson, went to the National Savings and Trust Company and had a discussion with its officer, Mr. McCeney, relative to any records kept by the bank pertaining to transactions involving $1,000 bills. But apparently he did not identify his inquiries with the Levin Case. He also visited intermittently the court room at the trial of Cross who was indicted with but tried before Levin. He there heard testimony about the changing of the $1,000 bills into bills of smaller denomination (Transcript, pages 187, 188, 189, 190), but for reasons stated by him at the hearing he did not return to the bank to make further inquiry.

16. Another document which Levin's present counsel claims was suppressed is Government's Exhibit 4 herein. The obtaining of this document by the Government came about in this way: The trial prosecutor, then the attorney for the Government before the grand jury, having heard that the thirty-five $1,000 bills given to Olson were changed into smaller bills, asked the special agents of the grand jury investigating Levin to visit the officer of the bank who allegedly changed the thirty-five $1,000 bills into smaller denominations (Transcript, page 198). The visit was made in 1962 by the agents and they obtained the statement from Mr. McCeney which is Government's Exhibit No. 4 (Transcript, page 199). It reads:

> Statement by B. B. McCeney, Assistant Treasurer
>
> Re: Bakery and Confectionery Workers Union of America General Account.
>
> I hereby recall Mr. Olson coming in with a $35,000 check, dated February 13, 1959 to be cashed but I do not recall a telephone call from Mr. Olson to arrange the cashing of this check. Mr. Olson came in and I took him to Mr. Hooper, who, at that time, was running one of the savings windows and handling the large cash, to cash this check which he did in thousand dollar bills. I do not recall Mr. Ashby coming in to change the thousand dollar bills to smaller ones. If he did I would have taken him back to Mr. Hooper because he was handling the large bills. Mr. Hooper says he does not recall cashing this money into smaller bills that day. Our auditors checked the records for teller sheets of Mr. Hooper for February 13, 1959 and could not locate them as it is our policy to keep our sheets not later than two years.

It is my understanding from the auditors that we do have the 1960 teller sheets in our files.

NATIONAL SAVINGS AND TRUST COMPANY

/s/ B. B. McCeney

Assistant Treasurer

Neither Mr. McCeney nor Mr. Hooper was called as a witness at the Levin trial. However, Mr. Hooper was a witness before the grand jury (Government's Exhibit 3). At the hearing herein both Mr. McCeney and Mr. Hooper were called as witnesses by the petitioner. But the bank transactions about which inquiry was made of them having occurred more than six years previously, their recollections were in the main vague and speculative.

17. A further claim of Levin's present counsel is that the trial prosecutor required the production of certain teller settlement sheets of the National Savings and Trust Company for February 1959, including the teller settlement sheet of Mr. Hooper for February 13, 1959; that after their production they were not returned; and that Mr. Hooper's sheet for February 13, 1959 disclosed that the thirty-five $1,000 bills delivered to Olson "were never returned that day or in the near future" (Amendment of March 8, 1965 to the petition, page 4). The court finds that no teller settlement sheets for February 1959 were turned over to the trial prosecutor or to the grand jury or to the compliance officers of the Department of Labor, but were destroyed by the bank in accordance with its policy to destroy such records after a specified period (Transcript, pages 164, 165, 214, 215; Government's Exhibit 4). The court further finds

that there is no evidence that Mr. Hooper's teller settlement sheet for February 13, 1959 made the disclosure claimed by Levin's counsel.

18. The indictment charging Levin with larceny was returned on November 1, 1962 and thereafter on January 11, 1963 Mr. Stein, Levin's attorney at that time, filed a motion for discovery. Although purporting to be filed pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the requested discovery exceeded the permissible scope of that Rule. The motion in general terms sought all checks, records and correspondence obtained from Levin and others by seizure or process, or otherwise, relevant to any matter alleged in the indictment. No particular documents were designated. The Government opposed the motion on several grounds, contending that Rule 16 is not available to a defendant for the purpose of going through the Government's files to obtain a dress rehearsal of the prosecution. On January 25, 1963 the motion was "granted only insofar as the showing of the check to defense counsel is concerned", this being the check which Olson cashed on February 13, 1959 at the National Savings and Trust Company, receiving therefor thirty-five $1,000 bills. Accordingly, this check was exhibited to Mr. Stein, Levin's counsel at that time.

19. The evidence at the hearing did not show that Government counsel deliberately suppressed any evidence.

WHEREFORE, the court concludes as a matter of law:

1. Petitioner has failed to sustain his burden of proof as to his allegation of perjured testimony by a Government witness.

2. Petitioner has failed to prove his allegation that trial counsel deliberately suppressed evidence.

3. The petition should be dismissed.

Burnita Shelton Matthews
JUDGE

June 11, 1965
DATE

Petr's
DEF. EX. 1
PLTF. In evid

C

GENERAL ACCOUNT

No 6131

Date

$

PAY TO THE ORDER OF

Patent H. Gibbon, Service Officer
Local Union #2

BUILDING AND CONSTRUCTION WORKERS INTERNATIONAL UNION OF AMERICA

[redacted]

[redacted]

ENDORSEMENTS

THIS CHECK IS HEREBY ACCEPTED BY THE PAYEE IN FULL PAYMENT OF THE ACCOUNT AS STATED ON FACE OF CHECK
NO OTHER RECEIPT IS NECESSARY

EXHIBIT 1-D

The Government's evidence may be summarized as follows:

In January, 1959, James Landriscina and Vincent Belloni, officers of local unions of the Bakery and Confectionery Workers' International, met petitioner, a lawyer, at his office in New York City. Petitioner offered to "fix" a perjury case then pending in the District of Columbia against Cross for about $35,000 to $40,000. (R. 3–4, 6–8, 306, 309, 358, 434.) Early in February, petitioner discussed the case with Landriscina and Cross in Washington. He told them that he could fix the case for $35,000 and asked for an additional payment for himself. Cross agreed to pay him $17,500 as a lobbyist for the International (R. 9–15).

On Friday, February 13, 1959, Peter H. Olson, secretary-treasurer of the International, cashed a $35,000 check drawn on the union's funds as a strike donation (R. 210–212). The money was given to Landriscina who made two payments totalling $35,000 to petitioner.[3] Petitioner stated that he would use the money to take care of the jury, the judge, and the court attendant (R. 18–26).

While the trial of Cross was in progress, on February 16 and 17, 1959, petitioner was in the corridors of the courthouse and assured Landriscina that everything looked all right (R. 27–31 993–995). It was stipulated that no one had approached either the judge or the jury (R. 507–508). After the trial judge directed a verdict of acquittal (170 F. Supp. 303), petitioner told Landriscina to be sure that Cross

[3] Landriscina testified, apparently incorrectly, that he made the first payment of $10,000 on February 12 (R. 19–25).

E

Petr
Exh. No. 2
For ID. 4-8-59

No. 76534

FIRST [illegible]

[illegible]
[illegible]
WASHINGTON, D.C., February 13, 1959 $35,000.00

PAY TO THE ORDER OF RIGGS NATIONAL BANK (FOR CITY) * * * * *

[illegible] DOLLARS

TO THE RIGGS NATIONAL BANK,
[illegible] WASHINGTON, D. C.

Assistant Treasurer

Stamp

[illegible]
FEB 18 1959

No. 76534

Date February 13, 1959

Amount 35,000.00

For Final Pay. to Bldr. [illegible]

EXHIBIT. 1-K

14683

Statement by B. B. McCeney, Assistant Treasurer

Re: Bakery and Confectionery Workers Union
of America General Account.

I hereby recall Mr. Olson coming in with a $35,000 check, dated February 13, 1959 to be cashed but I do not recall a telephone call from Mr. Olson to arrange the cashing of this check. Mr. Olson came in and I took him to Mr. Hooper, who, at that time, was running one of the savings windows and handling the large cash, to cash this check which he did in thousand dollar bills. I do not recall Mr. Ashby coming in to change the thousand dollar bills to smaller ones. If he did I would have taken him back to Mr. Hooper because he was handling the large bills. Mr. Hooper says he does not recall cashing this money into smaller bills that day. Our auditors checked the records for teller sheets of Mr. Hooper for February 13, 1959 and could not locate them as it is our policy to keep our sheets not later than two years. It is my understanding from the auditors that we do have the 1960 teller sheets in our files.

NATIONAL SAVINGS AND TRUST COMPANY

Assistant Treasurer

GB

14683

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

THE UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.
	)	
JAMES G. CROSS	)	
MILTON M. LEVIN	)	
JAMES LANDRISCINA	)	

MOTION FOR DISCOVERY AND INSPECTION UNDER RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The defendant, Milton M. Levin, moves this Court under Rule 16, Federal Rules of Criminal Procedure, to require the United States of America, the plaintiff herein, through its designated United States Attorney for the District of Columbia, to produce and permit inspection of and to copy checks, records and correspondence obtained from the defendant, Milton M. Levin, and from persons, firms, organizations and corporations by seizure or process in connection with the grand jury investigation which resulted in this indictment, or otherwise in connection with this proceeding, and which are relevant to any matter alleged in the indictment.

The materials sought to be discovered are believed to be material to the preparation of the defense of the defendant, Milton M. Levin, and this request is believed to be reasonable.

January 11, 1963

Oliver E. Stone

Jacob A. Stein

Attorneys for Defendant,
Milton M. Levin

14683

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 913-62
	:	
JAMES G. CROSS MILTON M. LEVIN JAMES LANDRISCINA	:	

January 22, 1963

ANSWER AND OPPOSITION TO DEFENDANT LEVIN'S MOTION FOR DISCOVERY AND INSPECTION UNDER RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Comes now the United States by its attorney, the United States Attorney, and submits the following in answer and opposition to the instant motion:

I

In his motion defendant Levin invokes Rule 16, Federal Rules of Criminal Procedure, under which he seeks to inspect and copy any and all "checks, records and correspondence" obtained from the defendant and others by seizure or process, or otherwise, "which are relevant to any matter alleged in the indictment."

At the outset, it is not amiss to state, the defendant has not allowed the Government to retain any of his personal records. If so, defendant has failed in his motion to advise which records he has surrendered.

II

With respect to other documents in possession of the Government, defendant has failed to designate particular items sought. Without such a designation he is unable to show either materiality or that his request is reasonable. It is, therefore, patent, defendant's "motion is

deficient in all these respects," as was stated in United States v. Finnegan, 189 F. Supp. 728, 729 (N.D. Ohio, 1960).

> It may be conceded that examination of the Government's evidence in advance of trial would assist any defendant in preparing his defense, but the discovery processes of Rule 16 are not available, merely upon request, for the purpose of going through the Government's files to obtain "a 'dress rehersal' of the prosecution." (Citing United States v. Lipshitz, 150 F. Supp. 321, 322, 323; (D.C. E.D. N.Y. 1957); United States v. Haug, supra, 21 F.R.D. at p. 26.

In such a situation denial of defendant's motion pursuant to Rule 16, Federal Rules of Criminal Procedure, is proper. United States v. Finnegan, supra.

III

On the other hand, the Government is aware of checks, correspondence and records which pertain to this defendant, acquired from the Bakery and Confectionery Workers' International Union, with which defendant was formerly associated. To these, the Government consents to inspection and copying. See United States v. Finnegan, supra. Many, if not all of these, the defendant has previously inspected during his pre-indictment conferences with the Government.

IV

Defendant is not entitled to inspect or copy, under Rule 16, Federal Rules of Criminal Procedure, documents voluntarily surrendered to the Government. See United States v. Heulin, 29 F.R.D. 481 (1962).

V

The Government has no objection to inspection of any records, properly particularized or specified to which defendant is entitled. Only in this way can defendant's attempted "blunderbuss inspection of the Government's evidence in an attempt to learn something not known" be averted. See United States v. Frank, 23 F.R.D. 145 (D.C. D.C. 1959).

The Supreme Court has held that a request such as defendant Levin's, even when made under Rule 17(c), Federal Rules of Criminal Procedure, is "purely a fishing expedition to see to see what may turn up." Bowman Dairy Co. v. United States, 314 U.S. 214, 221 (1951). See also the most recent case, Smith v. United States, 209 F. Supp. 907 (E. D. Ill. 1962). That defendant seeks a "fishing expedition" and a "dress rehersal" is clear from his confusion engendered in his indiscriminate use of opinions under Rule 16, as well as under Rule 17(c), Federal Rules of Criminal Procedure. Nothing is plainer than the fact Rule 17(c) is not for discovery.

Wherefore, it is respectfully submitted defendant's motion for inspection under Rule 16, Federal Rules of Criminal Procedure, be denied, except in regard to those portions to which the Government consents.

DAVID C. ACHESON
United States Attorney

HARRY T. ALEXANDER
Special Attorney
Department of Justice

JOHN J. MILLANEY
Attorney
Department of Justice

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing opposition was mailed to Jacob A. Stein, Esquire, 1200 18th Street, N. W., Washington 6, D. C., and to Oliver E. Stone, Esquire, 1500 Massachusetts Avenue, N. W., Washington 5, D. C., this 2nd day of January, 1963.

HARRY T. ALEXANDER

14683

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

THE UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 913-62
	)	
JAMES G. CROSS	)	
MILTON M. LEVIN	)	
JAMES LANDRISCINA	)	

January 11, 1963

MOTION FOR BILL OF PARTICULARS

The defendant, Milton M. Levin, within the time fixed by this Court and without prejudice to any other motion filed, moves this Court for an order pursuant to Rule 7(f), Federal Rules of Criminal Procedure, directing that the Government furnish the defendant with a Bill of Particulars as to the Government's claims alleged in the indictment at a time fixed by this Court.

The Particulars refer to the Second Count of the Indictment which states:

"SECOND COUNT

On or about February 13, 1959, within the District of Columbia, and within the jurisdiction of this Court, defendant Milton M. Levin did unlawfully, feloniously and willfully steal, take and carry away the property of the Bakery and Confectionery Workers' International Union of America, an unincorporated association, entrusted to James G. Cross, President of said union, the said property consisting of $35,000 in money in violation of Title 22, District of Columbia Code, Section 2201."

The Particulars requested are as follows:

1. Give the exact time and date when the defendant, Milton M. Levin, allegedly did receive, take and carry away the $35,000 of the Bakery and Confectionery Workers' International Union.

2. Identify with particularity the place within the District of Columbia where defendant, Milton M. Levin, allegedly took $35,000 belonging to the Bakery and Confectinnery Workers' International Union. If the taking occurred in a residence or a building, give the exact street address of the residence or

building. If the taking did not take place in a residence or building, give the exact geographical location where it did take place.

3. State the Criminal convictions, if any, of any witnesses to be called by the Government at the trial.

4. Give the names and addresses of all the parties who were present at the time that Milton M. Levin did take and carry away the $35,000 of the Bakery and Confectionery Workers' International Union.

5. Give the names and addresses of the party or parties who it is alleged last had possession of the $35,000 immediately prior to the alleged larceny by Milton M. Levin.

6. State the names and addresses of the party, parties, organizations or corporations who had possession of the $35,000 in cash immediately prior to its being transferred from defendant James Cross to defendant Milton M. Levin.

7. State the denominations of the $35,000 in money which was allegedly taken by the defendant, Milton M. Levin. If the exact denominations are unknown, then give the approximate denominations.

8. If the $35,000 was withdrawn from a Banking Institution by check, then state the name and address of the Banking Institution, the exact date of withdrawal and the names and addresses of the party or parties making the withdrawal and the denomination at the time of withdrawal.

POINTS AND AUTHORITIES

Points and Authorities - Questions 1 and 2.

Defendant cites U. S. v. Wilson, Dist. Ct. New York (1957) 20 F.R.D. 569, in support of his request for the exact place where the alleged larceny took place. In this narcotics prosecution the Court ruled that the defendant was entitled to a Bill of Particulars designating by street and number, if possible, where the defendant was alleged to have received, possessed, concealed and

facilitated transportation and concealment of the narcotics, even if such acts allegedly occurred in different places.

The indictment supplies the defendant with no particular address where he is alleged to have committed the larceny other than the District of Columbia. This puts the defendant at a considerable disadvantage in ascertaining and corroborating his whereabouts. If the exact address is withheld, the defendant will have to wait until the Government puts on its case to begin an investigation to establish where the defendant was at the particular time the alleged larceny took place.

The same arguments apply with greater force concerning the question asking for the exact time and date when the defendant, Milton M. Levin, allegedly committed the larceny. The defendant carries on a law practice in New York City, New York, and verily believes that he was in New York City at least during part of the day of February 13, 1959. Unless he has the exact date and time of the alleged larceny, he will be severely and needlessly handicapped in his attempt to account for those hours during which the alleged acts took place. When one brings to mind that the defendant must account for a period of time 47 months ago one can appreciate his dilemma. The Particulars sought concerning the exact date, time and place are the minimum requirements necessary to conduct a responsible investigation on behalf of the defendant.

Points and Authorities - Question 3.

Evidence of convictions of crimes is admissible in the District of Columbia on the issue of credibility pursuant to Title 14-305, 1961 Ed. D.C. Code. The Government either has the criminal records or has them available to it of any witness whom it chooses to call. The defendant does not know the names of the witnesses whom the Government may call. Assuming the defendant did know the witnesses, he would be in a poor position as compared with the Government to determine which of these witnesses has been con-

victed of a crime.

The defendant draws attention to Griffin v. United States, 87 U.S. App. D.C. 172 (1950), on this issue of the Government's disclosing evidence which may be useful to the defense. At page 175 in Griffin, the Court stated:

> "However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done'. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314."

Points and Authorities - Questions 4, 5, 6, 7 and 8.

The above Particulars are requested so that the defendant may resolve obvious discrepancies between Count One of the Indictment which states under Overt Acts:

> "On or about February 13, 1959, within the District of Columbia, defendant James Landriscina gave the said Milton M. Levin a total of $35,000.00 all in violation of Section 371, Title 18, U.S.C." (Underlining supplied)

and the Second Count which charges that defendant Milton M. Levin took the same $35,000 from defendant James G. Cross.

Respectfully submitted,

Oliver E. Stone
1500 Massachusetts Ave.N.W.
Washington 5, D. C.

Jacob A. Stein
1200 - 18th Street, N.W.
Washington 6, D. C.

14683

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 913-62
	:	
JAMES G. CROSS	:	
MILTON M. LEVIN		
JAMES LAUDRISCINA	:	

January 22, 1963

ANSWER AND OPPOSITION TO MOTION FOR BILL OF PARTICULARS FILED BY DEFENDANT MILTON M. LEVIN

Comes now the United States, by its attorney, the United States Attorney, and submits the following with respect to the instant Indictment and motion:

I

The "exact time and date" of the larceny alleged, as requested, is not known, except to say that the larceny occurred on February 11 and 13, 1959, between the hours of 10: a.m. and 7: p.m. This allegation is reasonable since the "exact time" is not required. Cf. United States v. Giramonti, 26 F.R.D. 168, 169 (D. Conn. 1960).

II

The place in which the larceny occurred is a public park in the geographical location between Vermont Avenue and Sixteenth Street and K and I Streets in Northwest, Washington, D. C., believed to be known as McPherson Square.

III

The Government declines to furnish the information requested in defendant's paragraphs three (3) through eight (8). The grant or denial of a bill of particulars under Rule 7(f), Federal Rules of Criminal Procedure, is within this Court's discretion. United States v. Hanlin,

29 F.R.D. 481, 486 (W.D. Mo. 1962). The function of such a bill is to render an indictment sufficiently specific to apprise a defendant of the nature of the charge against him so that he may prepare for trial; that he may be spared surprise at trial, and that he may plead double jeopardy against a subsequent prosecution for the same offense. United States v. Giramonti, 26 F.R.D. 168, 169 (D. Conn. 1960), citing, Wong Tai v. United States, 273 U.S. 73, 80-81 (1927). The function is not to "require the government to disclose the evidence by which it intends to prove its case." United States v. Hanlin, supra.

Defendant Levin is charged in a concise manner with a relatively simple crime -- grand larceny. Yet, a cursory reading of defendant's particulars requested in paragraphs three (3) through eight (8) indicate he invokes Rule 7(f), Federal Rules of Criminal Procedure, to obtain, not only the evidence upon which the Government intends to rely, but the theory of the case as well. This, he is not entitled to. United States v. Hanlin, supra.

More specifically defendant is not entitled to particulars requested in paragraphs three (3), four (4), five (5), six (6) and eight (8), inasmuch as such would require disclosure of witnesses the Government intends to use at trial. United States v. Hanlin, supra; United States v. Giramonti, supra. See also United States v. Brevard, 27 F.R.D. 250 (S.D. N.Y. 1961).

Paragraph seven (7) is indicative of the nature of defendant's motion -- to secure the Government's evidence in advance of trial. Prescinding from the fact that the denominations of the bills used in the larceny is evidentiary, defendant can suggest no good reason as to how such knowledge would aid him in respect to the functions of a bill of particulars as enumerated above. See United States v. Casserino, 189 F. Supp. 288, 289 (E.D. N.Y. 1960).

Suffice it to add, contrary to defendant's contention, there is no legal discrepancy between the overt act under Count One of the Indictment charging that " . . . defendant James Landriscina gave the said Milton H. Levin a total of $35,000," and Count Two of the Indictment which alleges that the same $35,000 was the property of the Bakery Union, and entrusted to James G. Cross. Thus, it appears defendant's alleged reason for requesting items in paragraph four (4) through eight (8) is frivolous.

Wherefore, it is respectfully submitted that the instant motion for a bill of particulars be denied, except in regard to those portions to which the Government voluntarily consents.

DAVID C. ACHESON
United States Attorney

HARRY T. ALEXANDER
Special Attorney
Department of Justice

JOHN J. MULLANEY
Attorney
Department of Justice

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing opposition was mailed to Jacob A. Stein, Esquire, 1200 18th Street, N.W., Washington 6, D.C., and to Oliver E. Stone, Esquire, 1500 Massachusetts Avenue, N.W., Washington 5, D. C., this 2nd day of January, 1963.

HARRY T. ALEXANDER

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,590

MILTON M. LEVIN,

Appellant,

v.

NICHOLAS de B. KATZENBACH,

Appellee.

APPELLANT'S REPLY BRIEF

Of Counsel:

Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

THURMAN ARNOLD
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorney for Appellant

Dated: October 27, 1965

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,590

MILTON M. LEVIN,

Appellant,

v.

NICHOLAS de B. KATZENBACH,

Appellee.

APPELLANT'S REPLY BRIEF

The government's brief meets none of the issues presented by appellant. Instead, it attempts to obscure them by stating the questions presented as follows:

> "In the opinion of the appellee, the following questions are presented:
>
> 1. Whether appellant is entitled to collateral relief from his conviction on the ground that his trial was lacking in fundamental fairness because:
>
> (a) witnesses called by the Government differed as to a single material fact and the Government later said in an appellate brief that the version of one was apparently incorrect;

(b) if two documents in the possession of the Government had been revealed to appellant's trial counsel, he might have sought circumstantial evidence that one of the Government's witnesses to a collateral fact was lying, and in interviewing two potential witnesses (one of whom he interviewed anyway) he would have discovered testimony that was so vague and speculative as to be worthless in proving appellant's innocence.

2. Whether appellant is entitled to a new trial on the ground of newly discovered evidence where his trial counsel did not use due diligence in trying to procure the worthless testimony mentioned in (b), above."

With respect to question 1(a) above: it becomes necessary to repeat facts set out in our original petition which the government does not discuss.

The "single material" fact referred to by the government in question 1(a) above is whether or not any payments of money were made by the witness Landriscina to the appellant (hereinafter referred to as Levin). Landriscina, an alleged accomplice, was the only witness to testify about these payments. (Tr. 19-23, 25-26, Appendix 5). No one else was present at his alleged meetings with Levin when the payments were purportedly made. Landriscina stated with elaborate detail that pursuant to a telephone call the evening before (Tr. 22-23, Appendix 5), (which is not corroborated), he arranged to meet Levin at the Statler Hotel between 11 and 11:30 A.M. on February 12th. (Tr. 19, Appendix 5). He said Levin asked him to

bring $10,000 in cash at that meeting. He went on to say that he did meet Levin at the Statler, walked to a park, and gave Levin $10,000 in one thousand dollar bills. (Tr. 20, Appendix 5). At 12 P.M. Levin telephoned Landriscina and asked to meet again at the Statler. They met and Levin returned the money, asking for smaller denominations. (Tr. 23, Appendix 5). Between 12:45 and 1:00 P.M. they met a third time at the Statler and Landriscina gave him $10,000 in smaller denominations. (Tr. 24, 24, Appendix 5). At the end of that third meeting they arranged another meeting at the Statler on the next day, February 13th. They had no contact or communication between the meeting on February 12th and the one on February 13th. (Tr. 22, 24, 25, Appendix 5).

Unfortunately for Landriscina the record showed that the check from which the ten $1,000 bills were derived was not cashed until the next day. (Tr. 198, Appendix 3). There was therefore no possibility that any payment of $1,000 bills could have been made on February 12th. The Solicitor General, in his opposition to certiori, noted this fact and admitted that no payment was made on February 12th. (Appendix 7, p. 3).

In the face of the record and the admission of the Solicitor General, the case against Levin in so far as it is based upon payments on February 12th falls to the ground. Had this admission

been before the jury the Court could not have instructed as it did, that the jury might find from the evidence that payments were made by Landriscina to Levin on February 12th.

But the admission which the Solicitor General was compelled to make goes further than to destroy Landriscina's testimony as to a meeting on February 12th. It also demonstrates that there could have been no meeting on February 13th. This is because it was at the meeting on February 12th that arrangements were made to meet at the Statler on February 13th at 5 P.M.[1/] Landriscina testified there was no contact between him and Levin between these two meetings (Tr. 24, 25, Appendix 5); therefore, Levin would not have known where to go for the second meeting. This cannot be characterized, as the government attempts to do, as a lapse of memory on the part of Landriscina as to the time of the meeting, which was subsequently corrected by Ashby's testimony.

It is true, of course, that the Solicitor General's admission refers to payments on February 12th. He does not admit that there could have been no meeting. But Landriscina's testimony is so explicit as to what happened on February 12th that it is impossible that any other type of meeting would have been held.

1/ Referring to the appointment for Friday, February 13th at 5 P.M. Landriscina testified: "Q When did you make that appointment? A When I gave him the $10,000. Q On Thursday, is that right? A Yes, sir." (Tr. 25, Appendix 5).

The court below apparently thought that there might possibly have been some sort of meeting on February 12th of an entirely different character than the one testified to by Landriscina. But neither the court nor the government has suggested what sort of a meeting that could have been, or what could have been said at such a meeting.

To sustain a conviction on Landriscina's testimony in the face of the admission of the Solicitor General would require some sort of explanation of how Levin could have known the time and place of the meeting on February 13th. The government declines to explain. But even if it did have some speculative theory, it has no evidence to support it.

A detailed review of Ashby's testimony further establishes that this was more than a mere difference between two witnesses as "to a single material fact," and "the version of one was apparently incorrect."

Ashby testified that early in the morning Olson gave him 35 "one thousand dollar" bills; he put them in the safe (Tr. 224, Appendix 5); he counted out 10 one thousand dollar bills and gave them to Mr. Landriscina. Later in the day Landriscina brought the $10,000 back and said the bills were too large; thereupon Ashby took the 35 one thousand dollar bills to the National Savings and Trust

Company and had them changed into twenty dollar bills. He then came back and gave $10,000 of the smaller bills to Landriscina, putting the other $25,000 in the safe (Tr. 225, Appendix 5). Early afternoon Landriscina came back for the remaining $25,000 in twenty dollar bills which Ashby gave him. (Tr. 226, Appendix 5) He does not testify what Landriscina did with the money. These fantastic transactions make no sense whatever. Ashby's testimony is incredible on its face. Why should 1750 twenty dollar bills have been delivered to Landriscina in two installments a few hours apart? The answer is furnished by the newly discovered evidence of the bank officials. The fantastic transaction testified to by Ashby of changing 35 one thousand dollar bills into 1750 twenty dollar bills about 12 o'clock on Friday, February 13th, never occurred. Ashby never got 1750 twenty dollar bills from the bank.

This is established by the newly discovered evidence of the two bank officials who testified at the hearing on habeas corpus, McCeney and Hooper. McCeney remembered in detail the transaction by which Olson cashed the Union check and received 35 one thousand dollar bills. But he could not remember that the bills had ever been changed into one thousand dollar bills the same day. He told this to the government in 1962 in a document which was withheld from trial counsel. (Government Ex. 4, Appendix 3).

Mr. Hooper, the other bank official, testified at the habeas corpus hearing that he also did not remember any transaction involving the changing of the bills. On cross examination, the government elicited a statement from Mr. Hooper that it would have been "possible" for this unusual occurrence to have taken place without his knowledge. But on redirect examination, the following question was asked:

> "If the routine procedures of the bank had been followed with respect to the cashing of -- the changing of thirty-five $1,000 bills into seventeen hundred and fifty $20 bills, if those procedures had been followed, would it have been possible for you not to have known about it?"
>
> "MR. ALTSHULER: I object to that question on the grounds --
>
> "THE COURT: What was your answer?
>
> "THE WITNESS: I said it would not have been possible for me not to have known about it.
>
> "THE COURT: I thought you testified on your direct examination that other tellers could have done it?
>
> "THE WITNESS: Well, they could have, but I would have known about it, that's the point, I would have known about it.
>
> "THE COURT: Is that all?
>
> "MR. ARNOLD: That is all."
>
> (Tr. 129-130, Appendix 3)

Yet the government has the effrontery to suggest in question 1(b) supra that this testimony "was so vague and speculative as to be worthless in proving appellant's innocence." Certainly that testimony would have gone further than to introduce a reasonable doubt in the case as to Ashby's story of the changing of the bills. It would have made appellant's acquittal almost certain.

The two documents which should have led the pretrial counsel for appellant to discover the testimony of the bank officials were the following:

(1) A check on the Riggs National Bank drawn by the National Savings and Trust Company to replace the 35 one thousand dollar bills drawn by the National Savings and Trust Company.

Mr. Hooper testified that this check would not have been drawn if Ashby or anyone else returned to the National Savings and Trust Company the same day. (H.C. Tr. 59, Appendix 3)

(2) The second document which led to the discovery of the new evidence was a memorandum of a conversation with Mr. McCeney obtained by the government, which read as follows:

"I hereby recall Mr. Olson coming in with a $35,000 check, dated February 13, 1959 to be cashed but I do not recall a telephone call from Mr. Olson to arrange the cashing of this check. Mr. Olson came in and I took him to Mr. Hooper, who, at that time, was running one of the savings windows and handling the large cash, to cash this check which he did in thousand dollar bills. I do not recall Mr. Ashby coming in to change the thousand dollar bills to

> smaller ones. If he did I would have taken him back to Mr. Hooper because he was handling the large bills. Mr. Hooper says he does not recall cashing this money into smaller bills that day. Our auditors checked the records for teller sheets of Mr. Hooper for February 13, 1959 and could not locate them as it is our policy to keep our sheets not later than two years. It is my understanding from the auditors that we do have the 1960 teller sheets in our files." (emphasis added) (Government Ex. 4, Appendix 3)

The underlined portion of this document would certainly have led trial counsel for the appellant to examine the bank in order to determine whether the fantastic exchange of 35 one thousand dollar bills for 1750 twenty dollar bills had actually taken place.

It appears to be the position of the government that these documents were not knowingly and deliberately withheld. This position is impossible to take because trial counsel for appellant brought discovery proceedings asking for these documents. The government opposed on the grounds that it was a fishing expedition. Certainly this was a deliberate withholding of the documents. It is impossible to believe that counsel for the government did not know their significance. If they had thought that the documents had no significance there would have been no reason to resist their disclosure.

The government argued that counsel for the prosecution did not use due diligence in discovering the testimony of the bank

officials which has been introduced in the habeas corpus and which leads to the irresistible conclusion that no change of bills had ever occurred. Mr. Jacob Stein, the attorney who defended the petitioner, testified that he did not see either of the two documents described above which have been produced in this case. (H.C. Tr. 172, 173, 183, Appendix 3). He was under a misapprehension and thought that the only way to determine whether the exchange had actually been made was to obtain the numbers of the one thousand dollar bills. He went to the bank officials without mentioning the case and asked if they had such records. When they told him they had not he dropped the inquiry.

It may well be that more astute counsel would have pursued the inquiry further. But it does not lie in the mouth of the government to assert that they had the right to withhold from trial counsel the very documents which would have led him to discover the testimony which now appears in the habeas corpus record establishing that the changing of the bills could not have taken place without the knowledge of McCeney and Hooper unless the routine procedures of the bank had been violated.

To sum up, the record in the criminal case, plus the newly discovered admissions by the Solicitor General, and the testimony of the bank officials McCeney and Hooper, affirmatively shows as follows:

1. The testimony of Landriscina as to the three meetings on February 12th, as a result of which $10,000 in twenty dollar bills was finally paid to appellant is perjured. It is contradicted by the date the check was cashed and by Ashby's testimony that all of the payments were made on the 13th. The admission of the Solicitor General that there were no payments on February 12th comes as a result of these facts. Had there been an admission of this kind on the part of prosecution at the time of trial it would have enabled counsel to bring out the further fact that unless there was a meeting on the 12th there could not have been one on the 13th and the prosecution's case would have been destroyed.

2. The testimony of Ashby that there were $35,000 paid to appellant in twenty dollar bills on the 13th is shown to be false by the newly discovered testimony of the bank officials Hooper and McCeney, which shows that there could not have been such a fantastic transaction without the knowledge of Hooper and McCeney who testified they had no recollection of it, unless the tellers violated the rules of procedure of the bank. Therefore, Ashby could not have had 1750 twenty dollar bills to be delivered to the appellant by Landriscina on the 13th.

3. The government deliberately withheld, in the face of a discovery motion, the documents (Exhibits 2, 4, Appendix 3) which would have led trial counsel to produce at the trial the testimony of McCeney and Hooper.

4. The admission of the Solicitor General is newly discovered evidence, the effect of which is to establish that there was no meeting between Landriscina and appellant either on February 12th or 13th. The only answer which we can find in the government's decree to this contention is as follows:

> "As for appellant's original point, one can only wonder whether appellant would intend to call the Solicitor General as a defense witness in a new trial and ask his opinion about the correctness of Landriscina's testimony. It would be interesting to know the theory upon which he contends such testimony would be admissible."

It is quite true that if the Solicitor General had not made this admission he could not have been called on the stand. Having made the admission, it is not necessary to call him, because the admission constitutes newly discovered evidence relevant to the central issue in the case and made not inadvertently, but in the official capacity of the Solicitor General of the United States.

We therefore believe that the record on habeas corpus, plus the newly discovered evidence go further than casting a reasonable doubt on conviction of the defendant; indeed, we think it establishes his innocence.

Respectfully submitted,

THURMAN ARNOLD
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorney for Appellant

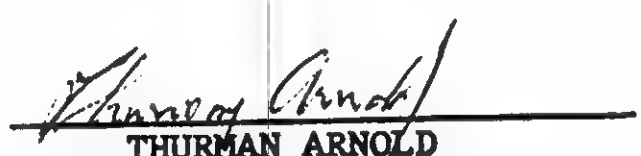
Of Counsel:

Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Dated: October 27, 1965

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply Brief has been mailed by the undersigned to Frank Q. Nebeker, Esquire, Assistant United States Attorney, United States Court House, Washington, D. C., on this 26th day of October 1965.



THURMAN ARNOLD
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,590

MILTON M. LEVIN, APPELLANT

v.

NICHOLAS DEB. KATZENBACH, APPELLEE

Appeal From the United States District Court for the District of Columbia

---

JOHN C. CONLIFF, JR.,
United States Attorney.

FRANK Q. NEBEKER,
OSCAR ALTSHULER,
DAVID W. MILLER,
Assistant United States Attorneys.

H.C. No. 95-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Whether appellant is entitled to collateral relief from his conviction on the ground that his trial was lacking in fundamental fairness because:

(a) witnesses called by the Government differed as to a single material fact and the Government later said in an appellate brief that the version of one was apparently incorrect;

(b) if two documents in the possession of the Government had been revealed to appellant's trial counsel, he might have sought circumstantial evidence that one of the Government's witnesses to a collateral fact was lying, and in interviewing two potential witnesses (one of whom he interviewed anyway) he would have discovered testimony that was so vague and speculative as to be worthless in proving appellant's innocence.

2. Whether appellant is entitled to a new trial on the ground of newly discovered evidence where his trial counsel did not use due diligence in trying to procure the worthless testimony mentioned in (b), above.

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

Cases—Continued

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,590

MILTON M. LEVIN, APPELLANT

v.

NICHOLAS DEB. KATZENBACH, APPELLEE

Appeal From the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE *

Appellant was convicted of grand larceny.[1] This Court affirmed the conviction and denied rehearing en banc.[2]

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* The transcripts in the record on appeal are cited as follows: "H. Tr.," hearing on appellant's petition for writ of habeas corpus, Habeas Corpus No. 95-65; "T. Tr.," testimony at appellant's trial, Crim. No. 913-62; "Arg. Tr.," closing arguments at appellant's trial, Crim. No. 913-62.

[1] Indictment filed November 1, 1962. Verdict found May 10, 1963. Sentenced to six months to two years June 21, 1963. Crim. No. 913-62.

[2] Judgment affirmed June 30, 1964. Petition for rehearing en banc denied September 22, 1964. *Levin* v. *United States*, No. 18024, —— U.S. App. D.C. ——, 338 F.2d 265.

The Supreme Court denied certiorari.[3] Then appellant filed in the District Court a petition for habeas corpus or for a new trial.[4] After a hearing it was denied and this appeal followed.[5]

Background of the case

The Government's evidence at the trial showed that appellant received $35,000 belonging to the Bakery and Confectionery Workers' International Union of America (hereinafter called BCW) for the purpose of "fixing" the trial of James G. Cross in the United States District Court for the District of Columbia (Criminal No. 913-62), whereas, in fact, appellant had no intention of trying to "fix" the Cross trial, but took the $35,000 with intent to steal it.[6] James Landriscina testified that he delivered the $35,000 to appellant in two cash installments: $10,000 on the morning of February 12, 1959, and $25,000 about 5:00 P.M. on February 13 (T. Tr. 17-27, 96, 120, 125-126, 143). Peter H. Olson and Richard Ashby, however, testified that the money for this purpose was not given to Landriscina until the morning of February 13 (T. Tr. 195-199, 210-214, 216-217, 223-226, 252-259, 600-601). Their testimony was corroborated by the date stamped on the check by which Olson acquired the cash for Landriscina to deliver to appellant (hereinafter called the Olson check)[7] and by a document identified as a union Finance Committee memorandum.[8] The conflicting evi-

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[3] Certiorari denied February 1, 1965. *Levin* v. *United States*, No. 706, O.T. 1964, 379 U.S. 999.

[4] Petition filed February 25, 1965. Amendment filed March 8, 1965. Habeas Corpus No. 95-65.

[5] Findings of Fact and Conclusions of Law filed June 11, 1965. Order dismissing petition filed June 15, 1965. Habeas Corpus No. 95-65.

[6] The evidence at the trial is stated at length in the briefs filed in *Levin* v. *United States*, No. 18024.

[7] Gov't Ex. 5 at trial; Petitioner's Ex. 1 at habeas corpus hearing.

[8] Gov't Ex. 4 at trial.

dence as to the date of the first meeting appeared on direct examination during the Government's case-in-chief and was explored at length on cross-examination. It was highlighted by evidence adduced by appellant.[9] It was argued to the jury.[10] It was discussed in the briefs before this Court [11] and in this Court's opinion.[12]

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[9] If believed, appellant's evidence established that he came to the District of Columbia from New York late in the afternoon of February 12 and left early in the afternoon of the following day. Thus, the times of the meetings were crucial. See *Levin* v. *United States*, —— U.S. App. D.C. ——, 338 F.2d 265, 269 (1964).

[10] DEFENSE COUNSEL: "James Landriscina has testified that he gave my client $10,000 on February 13, 1959 [*sic*]. Now, I have here the check for $35,000 which gave rise to the money which they claim was given to my client by James Landriscina. This check was cashed on February 13, 1959. There was no money in existence to give my client on February 12, 1959." (Arg. Tr. 28.) "It isn't in dispute that this check was cashed February 13, and if you are asked to ignore this fact by the prosecution, then a very good reason should be given to you . . . ." (Arg. Tr. 29.) "On his July 5th, 1962, visit to Mr. Alexander's office, he said he gave this money to my client on February 9th, 1959—just as impossible as February 12th, 1959, having in mind that this check wasn't cashed until the 13th . . . . Now, the reason he says he gave it to my client on the 12th—I can't find the document now, but in one of these documents, I believe, it reflects that the check was drawn on the 12th. He forgot that it was cashed on the 13th, so he is caught there. He says that he gave to my client, around 11 o'clock in the morning of February 12th, gave him $10,000 in $1,000 bills. But does that jibe with the other evidence in this case? No." (Arg. Tr. 30-31.)

GOVERNMENT COUNSEL: "Now, you talk about errors: even Mr. Stein, while talking to you about a check of $35,000, forgot, actually forgot the document on which he could find the date of that check, and everybody knows it is on the check. This could happen to anyone. . . . Why can't the witnesses be a little confused with respect to time? Isn't it better to be a little confused with respect to time than to come in here and conjure up testimony and say the very same thing? But you didn't hear that from these witnesses." (Arg. Tr. 59.)

[11] The Brief for Appellant, *Levin* v. *United States*, No. 18024, pp. 5-10, recounted at length the "inconsistent prosecution versions of the alleged payments." The Brief for Appellee, p. 4, n.3, said: "Landriscina's version was that the transfer of the first $10,000 to appellant, the changing of the $1,000 bills and meeting Olson on K Street occurred on the morning of February 12th, and that the

Petition for Habeas Corpus: "Perjured Testimony"

After the denial of certiorari by the Supreme Court, appellant retained new counsel, his fourth. In the prolixity of the prior litigation, counsel found a phrase in a footnote in the Government's brief before the Supreme Court: "Landriscina testified, *apparently incorrectly*, that he made the first payment of $10,000 on February 12 (R. 19-25)." [13] (Emphasis added.) Four days before this Court's judgment was due to be transmitted to the District Court, appellant's newly retained counsel filed a lengthy petition for writ of habeas corpus in which he characterized this phrase as a "confession of error" and "admission" by the Solicitor General that the Government's case had been knowingly based on perjured testimony.

The Government's answer pointed out that appellant's allegation was simply a rehash of factual issues which had been litigated at trial, argued on appeal, and presented to the Supreme Court on petition for certiorari. It denied that the Government had knowingly used perjured testimony. It pleaded that appellant lacked stand-

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second transfer of $25,000 (also in smaller denominations) occurred about 5:00 p.m. on Friday, February 13th (Tr. 17-27, 96, 109, 120). However, the corporeal evidence, the $35,000 check, and the Finance Committee memorandum tend to corroborate Olson and Ashby to the effect that both sums of money were transferred on Friday, February the 13th."

[12] "Other witnesses for the Government through whom Landriscina got the $10,000 in small bills gave testimony indicating that Landriscina did not receive the $10,000 until the morning of Friday, February 13, 1959. The jury thus could infer, if it credited this testimony and that of Landriscina that he paid the $10,000 to the appellant, that Landriscina was mistaken as to the date and that the transfer took place on February 13 instead of February 12." 338 F.2d at 269 n.4. See also *id.* at 276 n.1, 277 n.4 (dissenting opinion).

[13] The Government's brief in the Supreme Court was not formally received in evidence at the hearing below, but the footnote is quoted in the petition for writ of habeas corpus, p. 12, and was considered by the court below (H. Tr. 45). See Finding of Fact 5.

ing to seek the writ since he was not then in custody. Finally, treating the petition as a motion for a new trial on the ground of newly discovered evidence, it denied that the Solicitor General's comment was evidence.

Amended Petition: "Suppression of Evidence"

On the same day that the Government filed its return and answer, appellant's counsel filed an amendment to the petition for writ of habeas corpus. It will be recalled that Landriscina and Ashby had testified at the trial that shortly after Landriscina made the first payment of $10,000 to appellant in $1,000 bills, appellant told Landriscina that "the fellow who has to take care of the jury" would not accept $1,000 bills; Landriscina took back the $10,000 and returned it to Ashby, who went to the National Savings & Trust Co. and changed the entire $35,000 into $20 bills; Ashby gave $10,000 of these to Landriscina, who took them to appellant; later Landriscina received the remaining $25,000 from Ashby and paid it to appellant. (T. Tr. 23-25, 161, 224-226, 253-260.) In his amended petition, appellant's counsel alleged that he had recently interviewed two officers of the National Savings & Trust Co., who said that bank records would show that $35,000 in $1,000 bills had not been changed into $20 bills on February 13, 1959, and that the bank had had to replenish its supply of $1,000 bills from the Treasury on February 16. Both of these officers allegedly said that the records referred to were in the possession of the Government. Appellant's counsel, repeating his theory that

> "The Government's admission [*sic*] that the meeting on February 12 could not have taken place establishes with certainty that the meeting on February 13 could not have taken place,"

concluded that

> "The newly discovered evidence from the officials of the National Savings and Trust Company estab-

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The Government's answer pointed out that appellant's allegation was simply a rehash of factual issues which had been litigated at trial, argued on appeal, and presented to the Supreme Court on petition for certiorari. It denied that the Government had knowingly used perjured testimony. It pleaded that appellant lacked stand-

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second transfer of $25,000 (also in smaller denominations) occurred about 5:00 p.m. on Friday, February 13th (Tr. 17-27, 96, 109, 120). However, the corporeal evidence, the $35,000 check, and the Finance Committee memorandum tend to corroborate Olson and Ashby to the effect that both sums of money were transferred on Friday, February the 13th."

[12] "Other witnesses for the Government through whom Landriscina got the $10,000 in small bills gave testimony indicating that Landriscina did not receive the $10,000 until the morning of Friday, February 13, 1959. The jury thus could infer, if it credited this testimony and that of Landriscina that he paid the $10,000 to the appellant, that Landriscina was mistaken as to the date and that the transfer took place on February 13 instead of February 12." 338 F.2d at 269 n.4. See also *id.* at 276 n.1, 277 n.4 (dissenting opinion).

[13] The Government's brief in the Supreme Court was not formally received in evidence at the hearing below, but the footnote is quoted in the petition for writ of habeas corpus, p. 12, and was considered by the court below (H. Tr. 45). See Finding of Fact 5.

ing to seek the writ since he was not then in custody. Finally, treating the petition as a motion for a new trial on the ground of newly discovered evidence, it denied that the Solicitor General's comment was evidence.

Amended Petition: "Suppression of Evidence"

On the same day that the Government filed its return and answer, appellant's counsel filed an amendment to the petition for writ of habeas corpus. It will be recalled that Landriscina and Ashby had testified at the trial that shortly after Landriscina made the first payment of $10,000 to appellant in $1,000 bills, appellant told Landriscina that "the fellow who has to take care of the jury" would not accept $1,000 bills; Landriscina took back the $10,000 and returned it to Ashby, who went to the National Savings & Trust Co. and changed the entire $35,000 into $20 bills; Ashby gave $10,000 of these to Landriscina, who took them to appellant; later Landriscina received the remaining $25,000 from Ashby and paid it to appellant. (T. Tr. 23-25, 161, 224-226, 253-260.) In his amended petition, appellant's counsel alleged that he had recently interviewed two officers of the National Savings & Trust Co., who said that bank records would show that $35,000 in $1,000 bills had not been changed into $20 bills on February 13, 1959, and that the bank had had to replenish its supply of $1,000 bills from the Treasury on February 16. Both of these officers allegedly said that the records referred to were in the possession of the Government. Appellant's counsel, repeating his theory that

> "The Government's admission [*sic*] that the meeting on February 12 could not have taken place establishes with certainty that the meeting on February 13 could not have taken place,"

concluded that

> "The newly discovered evidence from the officials of the National Savings and Trust Company estab-

> lishes that no payments were made at any other time because the bills were never changed into the denominations allegedly required by petitioner. . . . And the shocking thing is that the attorney who was prosecuting the case had interviewed the Bank officials and must have known during the trial that the bills were not changed at the National Savings and Trust Company. Instead of disclosing this fact he made the Bank give him its records and suppressed them. This certainly is in violation of petitioner's constitutional rights."

The Government's answer to the amended petition categorically denied that the Government had deliberately suppressed evidence. On the theory of newly discovered evidence, it averred that the facts alleged in the amended petition were known by appellant's trial counsel or could have been discovered by him in the exercise of diligence.

Testimony at the hearing

At a hearing before Judge Matthews, who presided at the trial, appellant's counsel eventually named three specific documents which he claimed the Government had suppressed: (1) a check for $35,000 drawn by the National Savings & Trust Co. on the Riggs National Bank on February 13, 1959 (hereinafter called the Riggs check); (2) the teller's settlement sheet for February 13, 1959, of Hunter H. Hooper, assistant head teller of the National Savings & Trust Co.; and (3) a statement by Benjamin B. McCeney, assistant treasurer of the National Savings & Trust Co., obtained in September 1962. The history of these documents was shown in the following testimony.

Appellant's indictment grew out of an investigation of the BCW by the Department of Labor (H. Tr. 207). Having discovered the Olson check, *Floyd A. Marzo*, a compliance officer of the Department of Labor, on March 20, 1961, interviewed McCeney and Hooper, officers of the National Savings & Trust Co., where the check had been

cashed. Neither McCeney nor Hooper, who normally handled large cash transactions, could recall having cashed the Olson check. (H. Tr. 207-212.) The next day, Marzo interviewed Hooper again. This time Hooper said he remembered cashing the Olson check and giving Olson thirty-five $1,000 bills. Hooper explained that the bank tried to maintain at least $50,000 in $1,000 bills at all times, and he had found a check dated February 13, 1959—the Riggs check—which the National Savings and Trust Co. had drawn in order to replenish its supply of $1,000 bills after the Olson transaction. Hooper provided Marzo with a photostatic copy of the Riggs check.[14] (H. Tr. 212-213.)

This copy of the Riggs check and other evidence collected by the Department of Labor during its investigation were turned over to *Harry T. Alexander*, Special Attorney of the Department of Justice, on July 6, 1961 (H. Tr. 202-205).

It was not until June 1962, when Richard Ashby testified before the grand jury, that Alexander first learned that Ashby had taken the $1,000 bills back to the bank on the same day they were gotten and had McCeney change them into smaller denominations. (H. Tr. 195, 197.)[15] This information was confirmed by Landriscina in July 1962. (H. Tr. 197.)

In September 1962, Marzo, then serving as a special agent of the grand jury, interviewed McCeney again (H. Tr. 194, 198, 214). McCeney dictated his recollection as of that time to a stenographer, who typed it up as

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[14] Petitioner's Ex. 2 at habeas corpus hearing.

[15] Hooper testified before the grand jury on August 3, 1961. At the hearing below he recalled being asked about the exchange of $1,000 bills for $20 bills (H. Tr. 105-106). When Government counsel offered to prove that Hooper was mistaken, the court ordered that the transcript of his testimony before the grand jury be opened and received in evidence. It revealed that Hooper testified generally about several transactions on the BCW account, including the Olson check, but that he was never asked and never testified about changing the $1,000 bills. Gov't Ex. 3 at habeas corpus hearing. (H. Tr. 113-114, 122.)

a statement, which McCeney signed and gave to Marzo (H. Tr. 162-163, 214-216). In this statement, McCeney said:

> "I do not recall Mr. Ashby coming in to change the thousand dollar bills to smaller ones. If he did I would have taken him back to Mr. Hooper because he was handling the large bills. Mr. Hooper says that he does not recall cashing this money into smaller bills that day. Our auditors checked the records for teller sheets of Mr. Hooper for February 13, 1959 and could not locate them as it is our policy to keep our sheets not later than two years." [16]

Thereafter, Alexander talked to McCeney by telephone, and McCeney said that "he did not recall the situation, he didn't say he did not do it, he just said he didn't remember doing it." As a result of this conversation, Alexander did nothing further to verify Ashby's grand jury testimony on this point. (H. Tr. 199.) Hooper's settlement sheet for February 13, 1959, was never seen by or in the possession of any agent of the Government (H. Tr. 205, 213-215).

Hunter H. Hooper testified that after the Olson check had been cashed, "I had to replenish these [$1,000 bills] as soon as possible because we could have had another request the same day for large bills and we would have been short" (H. Tr. 56). Therefore, the Riggs check was drawn and sent to the Riggs National Bank by runner, who returned with the requested currency sometime before 2:00 P.M., February 13 (H. Tr. 57-58, 84). Although Hooper would not have drawn the Riggs check had he known that the $1,000 bills given to Olson had been returned for change, he acknowleged that the bills could have been returned without his knowledge (H. Tr. 59-60, 63, 85), and that the runner could not have been recalled after being sent out with the Riggs check (H. Tr. 85). In short, Hooper admitted that the allegation in the amended petition that "Hooper's records of February 13

[16] Gov't Ex. 4 at habeas corpus hearing.

disclose that the $35,000 in $1,000 bills delivered to Olson were never returned that day or in the near future" was false (Tr. 69-71).

Benjamin B. McCeney testified that he, too, had no personal memory about Ashby's coming to the bank to exchange the $1,000 bills on February 13 (H. Tr. 134-136, 155). He testified that the bank must have gotten its full supply of $1,000 bills "right back" after cashing the Olson check. He admitted that the statement attributed to him in the amended complaint—"that the records further disclosed that on Monday, February 16, they received from the Treasury Department other $1,000 bills in accordance with their regular practice to replenish that deficit"—was false. (H. Tr. 151, 154.)

Jacob Stein was appellant's trial counsel. Before appellant's trial, he had seen the Olson check (H. Tr. 178-179, 186). He knew that McCeney was involved in the cashing of the Olson check (H. Tr. 187).[17] He knew that there would be a conflict between Landriscina and other witnesses about the date of the first payment to appellant.[18] He knew that there would be testimony that the $1,000 bills had been changed into smaller bills at appellant's request (H. Tr. 187-188).[19] He was acquainted

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[17] One of appellant's co-defendants was tried separately before appellant. McCeney's part in cashing the Olson check came out in testimony at that trial. (Transcript of Testimony of Peter Olson, April 1 through 4, 1963, *United States* v. *James G. Cross*, Crim. Nos. 913-62 and 914-62, p. 31.) The transcripts of that trial were in Stein's possession during appellant's trial (see, *e.g.*, T. Tr. 98-101), and they are part of the record on appeal in the instant case. In appellant's trial, it was Stein who first mentioned McCeney's name in connection with changing the $1,000 bills into smaller denominations (T. Tr. 210; H. Tr. 180-181).

[18] *Compare* Transcript of Testimony of Peter Olson, *supra* note 17, pp. 31-44, *with* Transcript of Testimony of James Landriscina, April 4 and 5, 1963, *United States* v. *James G. Cross*, Crim. Nos. 913-62 and 914-62, pp. 19, 145-150. See note 17, *supra*.

[19] See Transcript of Testimony of James Landriscina, *supra* note 18, pp. 25-28. See note 17, *supra*. Stein also had in his possession during appellant's trial a deposition concerning these matters given by Ashby in a civil action (T. Tr. 260-264; H. Tr. 190).

with McCeney and had talked with him before appellant's trial about the bank's record-keeping practices with respect to large-bill transactions. From this conversation, he concluded that there was no document in existence at that time showing the changing of $1,000 bills for $20 bills on February 13. (H. Tr. 176, 178-180, 182-183, 187, 190.)

Court's Findings and Conclusions

With respect to the original petition for habeas corpus, the District Court found that "the statement of the Government in footnote 3 of its brief in opposition in the Supreme Court is not newly discovered evidence" (Finding of Fact 6). Accordingly, the court concluded "that there is nothing in the petition as filed February 25, 1965 warranting the granting of any relief" (Finding of Fact 8).

With respect to the amendment to the petition, the court, after making particular findings with respect to each document (Findings of Fact 9-18), concluded that "the evidence at the hearing did not show that Government counsel deliberately suppressed any evidence" (Finding of Fact 19).

In accordance with the foregoing, the petition as amended was dismissed and this appeal followed.

RULE INVOLVED

Rule 33, Federal Rules of Criminal Procedure, provides:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after ver-

dict or finding of guilty or within such further time as the court may fix during the 5-day period".

SUMMARY OF ARGUMENT

Appellant had the burden of proving that Landriscina *knowingly* testified falsely and the prosecutor *knowingly* used his perjured testimony. At most, the evidence shows that Landriscina may have been mistaken about one fact in his testimony. It does not show that he consciously lied. It does not show that the Government knowingly used perjured testimony.

The Government did not suppress evidence favorable to appellant. The two documents in the Government's possession which were not revealed to appellant's counsel before the trial—the McCeney statement and the Riggs check—were of no probative value, and the testimony which might have been developed upon seeing these documents—that of McCeney and Hooper—was so vague and speculative that it would have been completely worthless in proving appellant's innocence.

A fortiori, the McCeney statement and the Riggs check were not such evidence as would likely produce an acquittal in a new trial. Moreover, appellant did not show diligence in procuring this evidence. Therefore, he is not entitled to a new trial on the ground of newly discovered evidence.

ARGUMENT

I. Appellant is not entitled to collateral relief from his conviction.

A. *There is no evidence that the Government knowingly used perjured testimony.*

In order to be entitled to collateral relief from his conviction [20] on the theory that Landriscina testified falsely

[20] Appellant's imprisonment is imminent, this Court having recently transmitted its judgment in No. 18024 affirming the convic-

about the date of the first meeting, appellant had the burden of proving not merely that Landriscina was mistaken, but that Landriscina *knowingly* testified falsely and the prosecutor *knowingly* used his perjured testimony. *Griffin* v. *United States*, 103 U.S. App. D.C. 317, 318, 258 F.2d 411, 412, *cert. denied*, 357 U.S. 922 (1958); *Clark* v. *Warden*, 293 F.2d 479, 482 (4th Cir. 1961), *cert. denied*, 369 U.S. 877 (1962); *Spaulding* v. *United States*, 279 F.2d 65, 67 (9th Cir.), *cert. denied*, 364 U.S. 887 (1960); *United States* v. *Jakalski*, 237 F.2d 503, 504-505 (7th Cir. 1956), *cert. denied*, 353 U.S. 939 (1957); *Taylor* v. *United States*, 229 F.2d 826, 832 (8th Cir.), *cert. denied*, 351 U.S. 986 (1956); *In re Sawyer's Petition*, 229 F.2d 805, 809 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956); *Ryles* v. *United States*, 198 F.2d 199, 200 (10th Cir. 1952); see *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) *(dictum)*. At the hearing below, appellant introduced no new evidence to show that Landriscina's testimony was in error.[21] If error be assumed, he added nothing to show perjury. And

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tion. Since the trial court disposed of appellant's petition on the merits after a full evidentiary hearing, appellee is willing to assume that appellant would be eligible for some form of collateral relief if the trial court's decision on the merits was wrong.

[21] The Solicitor General's footnote was not evidence. See Argument II, *infra*. And it was not new. See notes 10-12, *supra*. Even if taken as evidence, it proves only that Landriscina was objectively mistaken; it does not tend to prove that Landriscina was aware of his error and intentionally persisted in it or that the prosecutor used his testimony knowing it to be perjurious. The only thing that is new in this part of the case is the theory of appellant's newly retained counsel that if the meeting of February 12 did not take place, the meeting of February 13 could not have taken place (Br. 5-6). This theory confuses the fact of the first meeting, at which appellant received $10,000 from Landriscina, with the time of it. As this Court recognized in affirming appellant's conviction, the jury could reasonably have found that that meeting occurred on the morning of February 13 and that Landriscina was mistaken as to the date. See Note 12, *supra*. Such an inference would not have required the jury to discredit Landriscina's testimony about what happened at that meeting, including the making of arrangements for the next meeting.

he did not even try to prove that the prosecutor knew about the alleged perjury. Thus, his argument on appeal boils down to the proposition that when different witnesses who have been called by the Government in good faith give different versions of the same event, the accused is constitutionally entitled to go free. No authority supports this proposition, and common sense rejects it as absurd.

B. *There is no evidence that the Government deliberately suppressed evidence favorable to appellant.*

Though it is recognized that the Government may not deliberately suppress evidence favorable to the accused in a criminal case, *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); see *Alcorta* v. *Texas*, 355 U.S. 28, 31-32 (1957), that constitutional principle does not authorize unlimited discovery, *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *Jordon* v. *Bondy*, 72 App. D.C. 360, 363, 114 F.2d 599, 602 (1940); *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 138 (2d Cir. 1964), approving concurring opinion in *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, 769 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955); see *Brady* v. *Maryland*, *supra* at 92 (concurring opinion). Thus, for example, it is axiomatic that the unrevealed evidence must be admissible and positively favorable to the accused. *Brady* v. *Maryland*, *supra* at 90-91; *Buchalter* v. *New York*, *supra* at 431; *Jordon* v. *Bondy*, *supra* at 364-365, 144 F.2d at 603-604; *Soulia* v. *O'Brien*, 94 F. Supp. 764, 769 (D. Mass. 1950), *aff'd*, 188 F.2d 233 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951). Appellant's argument falls on both counts.

Two documents in the Government's possession were not shown to appellant's trial counsel: the McCeney statement and the Riggs check. The former would have been inadmissible in evidence as hearsay, and the latter would have been completely meaningless without explanatory testimony. Therefore, appellant's contention must focus on the testimony which his trial counsel might have developed if he had known of the existence of the McCeney

statement and the Riggs check. Presumably he would have interviewed McCeney and Hooper, and they would have told him substantially what they testified to at the hearing below: that neither one remembered Ashby coming to the bank on February 13 to change thirty-five $1,000 bills into $20 bills; that Ashby could have come for this purpose without their knowing about it; and that the bank had no records at that time either to prove or to disprove the changing of the $1,000 bills. This testimony, appellee submits, would have been worthless in establishing appellant's innocence.

Appellant's counsel knew in advance of trial that the Government's evidence would show the changing of the $1,000 bills at the National Savings & Trust Co. See p. 9, *supra*. He had interviewed McCeney. It is not unreasonable to suppose that if he had pursued that interview somewhat he would have found out everything that was disclosed by McCeney and Hooper at the hearing below. It is a question whether he would have bothered to use their testimony; his strategy at the trial was to accept the substance of the Olson-Landriscina-Ashby-Landriscina transaction, attack Landriscina's credibility, and suggest that Landriscina had either pocketed the money himself or diverted it to someone other than appellant (Arg. Tr. 30, 35). But there should be no question that the ease with which he could have developed McCeney and Hooper's testimony, if he wanted it, defeats appellant's claim that the absence of their testimony from the trial is attributable to fundamentally unfair tactics by Government counsel. See *United States ex rel. Meers* v. *Wilkins*, *supra* at 140.

On this appeal, appellant makes much of what he perceives to be a distinction between deliberate and negligent suppression of evidence. Undoubtedly he recognizes that there is no foundation for characterizing the nondisclosure of the McCeney statement and the Riggs check as deliberate. Appellee submits that he has not even shown the nondisclosure to have been negligent. There was nothing in the pre-trial proceedings to put Government

counsel on notice to disclose these documents.[22] Mr. Alexander reasonably and correctly believed that he had pursued the changing of the $1,000 bills to a dead end, having discovered no evidence either to support or rebut Ashby's grand jury testimony. Even those authorities which do not require deliberateness in the nondisclosure of evidence before collateral relief may be extended require that a substantial showing of prejudice be made. See *Kyle* v. *United States*, 297 F.2d 507, 514-515 (2d Cir. 1961).

No language disposes of appellant's contentions more emphatically than this Court's in *Jordon* v. *Bondy*, *supra*:

> "Appellant's contentions . . . would impose upon the prosecuting officer the duty not only to represent the public, but to represent the accused so far as not only to disclose but to discover evidence which might be considered material to the defense, regardless to some extent of its admissibility, its merely cumulative effect, its equal availability to the accused, and its probable probative effect. Nothing in the Constitution or statutes imposes so broad an obligation." 72 App. D.C. at 363, 114 F.2d at 602.

II. Appellant is not entitled to a new trial, because the "newly discovered evidence" on which he relies would probably not produce an acquittal and appellant was not diligent in trying to procure it.

Under Rule 33, Fed. R. Crim. P., a party seeking a new trial on the ground of newly discovered evidence must show, among other things, that he was diligent in attempting to procure the evidence and that the evidence is such that in a new trial it probably would produce an ac-

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[22] Appellant's sweeping pre-trial motion to inspect all "checks, records, and correspondence" in the Government's possession, without further specification or assignment of particular grounds, cannot fairly be said to have singled out the seemingly innocuous documents involved in the instant proceeding. The Government properly opposed this motion as an unauthorized "fishing expedition," the trial court agreed, and appellant did not even see fit to attack the denial on direct appeal.

quittal. *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 236, 188 F.2d 652, 653 (1951); *Brown* v. *United States*, 333 F.2d 723 (2d Cir. 1964); *Ledet* v. *United States*, 297 F.2d 737, 739 (5th Cir. 1962); *United States* v. *Capece*, 287 F.2d 537 (2d Cir.), *cert. denied*, 368 U.S. 847 (1961); *United States* v. *Bertone*, 249 F.2d 156, 160 (3d Cir. 1957); *United States* v. *Stahls*, 194 F. Supp. 849 (S.D. Ind. 1961); *(Daniel) Smith* v. *United States*, 109 U.S. App. D.C. 28, 33, 283 F.2d 607, 610 (1960), *cert. denied*, 364 U.S. 938 (1961) (concurring opinion). The disposition of such a motion is committed to the sound discretion of the trial court, *Blackburn* v. *United States*, 97 U.S. App. D.C. 62, 228 F.2d 33 (1955); *Thompson* v. *United States*, *supra*; *McDonnel* v. *United States*, 81 U.S. App. D.C. 123, 155 F.2d 297 (1946); *Shibley* v. *United States*, 237 F.2d 327, 331 (9th Cir.), *cert. denied*, 352 U.S. 873 (1956), and that court's findings in the premises are reversible only in the most extraordinary circumstances where it clearly appears that they are not supported by any evidence, *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 356-357 (1963); *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946).

It is apparent from the testimony of appellant's trial counsel that diligence in procuring McCeney and Hooper's testimony was not shown. See pp. 9-10, *supra*. Moreover, a reading of McCeney and Hooper's testimony at the hearing below amply supports the trial court's finding that their recollections were in the main vague and speculative. See pp. 8-9, *supra*. That finding, together with whatever substance their testimony had leads inevitably to the conclusion that their testimony would not have affected the outcome of appellant's trial.

As for appellant's original point, one can only wonder whether appellant would intend to call the Solicitor General as a defense witness in a new trial and ask his opinion about the correctness of Landriscina's testimony. It would be interesting to know the theory upon which he contends such testimony would be admissible.

It is manifest that the trial court acted well within its discretion in denying the motion for a new trial.

CONCLUSION

What appellant apparently wishes to do in this collateral proceeding is to relitigate the sufficiency of the evidence on which he was convicted. This Court has already reviewed the evidence and found it sufficient. If appellant felt impelled to revive that issue in disguise, it is unfortunate that he chose to level grave charges of misconduct against the attorney who represented the Government at his trial. The testimony at the hearing below proves that appellant's accusations were totally unfounded. Government's trial counsel needs no *apologia* before this Court. Appellee has undertaken to deal with the legal issues presented on this appeal, such as they are, leaving it to the Court, if it wishes, to characterize their author.

It is respectfully submitted that the order of the District Court should be affirmed.

JOHN C. CONLIFF, JR.,
United States Attorney.

FRANK Q. NEBEKER,
OSCAR ALTSHULER,
DAVID W. MILLER,
Assistant United States Attorneys.

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